80-2171

No.

Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL DAVIDSON,
Senate Legal Counsel,
M. ELIZABETH CULBRETH,
Deputy Senate Legal Counsel,
PAULA A. SWEENEY,
CHARLES TIEFER,
Assistant Senate Legal Counsel,
1413 Dirksen Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435

QUESTIONS PRESENTED

1. Whether the court of appeals rendered an unnecessary judgment on the constitutionality of Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2), by failing to remand to the Immigration and Naturalization Service to determine the availability of alternative relief following the alien respondent's marriage to a United States citizen and the passage of the Refugee Act of 1980.

2. Whether Section 244(c)(2) is severable from the remainder of Section 244.

3. Whether the provision of Section 244 which cancels deportation and grants permanent residence to deportable aliens only after legislative review is a necessary and proper means of implementing the power of Congress over the admission of aliens.

The Senate also incorporates the following questions presented by the House of Representatives in its petition for certiorari:

4. Whether, in a proceeding under Section 106(a) of the Immigration and Nationality Act to review a final order of deportation, a court of appeals has jurisdiction to resolve the constitutionality of Section 244(c)(2) of the Act, which establishes congressional procedures for determining whether a particular deportation proceeding should be cancelled and the alien given permanent residence status.

5. Whether a concededly deportable alien has standing, in a Section 106(a) review proceeding, to challenge the constitutionality of Section 244(c)(2), pursuant to which the House of Representatives disapproved granting the alien permanent residence status.

6. Whether such a review proceeding constitutes a constitutional case or controversy, where both the deportable alien and the Immigration and Naturalization Service, the only two parties to the proceeding, are in total agreement that Section 244(c)(2) is unconstitutional and that the deportation order should be cancelled.

7. Whether the propriety of the Section 244(c)(2) procedures for congressional adjustment of the status of deportable aliens is a "political question."

CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement	3
Reasons for Granting the Writ:	
I. The Court of Appeals Rendered an Unnecessary Judgment on the Constitutionality of an Act of Congress	12
II. The Decision of the Court of Appeals on Severability Presents an Important Question of Federal Law	15
III. Certiorari Should be Granted to Review the Decision of the Court of Appeals that Section 244 is Unconstitutional	19
Conclusion	22
Appendix K	* 84a
Appendix L	85a

* The appendices to this petition are lettered and paginated consecutively to the appendices to the jurisdictional statement in No. 80–1832.

AUTHORITIES

Cases:	
Arnett v. *Kennedy*, 416 U.S. 134 (1974)	18
Buckley v. *Valeo*, 424 U.S. 1 (1976)	18, 19
Champlin Refining Co. v. *Corporation Commission*, 286 U.S. 210 (1932)	18
Electric Bond & Share Co. v. *SEC*, 303 U.S. 419 (1938)	18
INS v. *Stanisic*, 395 U.S. 62 (1969)	14
Jay v. *Boyd*, 351 U.S. 345 (1956)	16

Cases—Continued

	Page
Kleindienst v. *Mandel*, 408 U.S. 753 (1972)	20
Mathews v. *Diaz*, 426 U.S. 67 (1976)	22
McCorkle v. *United States*, 559 F. 2d 1258 (4th Cir., 1977), *cert. denied*, 434 U.S. 1011 (1978)	18
McGrath v. *Kristensen*, 340 U.S. 162 (1950)	16
New York City Transit Authority v. *Beazer*, 440 U.S. 568 (1979)	12
Oceanic Navigation Co. v. *Stranahan*, 214 U.S. 320 (1909)	20
Spector Motor Co. v. *McLaughlin*, 323 U.S. 101 (1944)	13
Thorpe v. *Housing Authority*, 386 U.S. 670 (1967)	14
United States v. *Jackson*, 390 U.S. 570 (1968)	16
Administrative Decisions:	
Matter of Kojoory, 12 I. & N. Dec. 215 (1967)	13
Constitution, statutes, and rules:	
Art. I, Sec. 7, Cl. 3	20
Act of June 28, 1940, Pub. L. No. 670, 54 Stat. 670	6, 15
Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206	10, 15
Act of September 11, 1957, Pub. L. No. 85–316, 71 Stat. 642, 8 U.S.C. 1255b	21
Act of October 24, 1962, Pub. L. No. 87–885, 76 Stat. 1247	12
Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 8 U.S.C. 1101 *et seq.*, as amended:	
Section 106(a), 8 U.S.C. 1105a(a)	2
Section 208, 8 U.S.C. 1158	14
Section 209(b), 8 U.S.C. 1159(b)	14
Section 241(a), 8 U.S.C. 1251(a)	3
Section 243(h), 8 U.S.C. 1253(h)	3, 13

Constitution, statutes, and rules—Continued
Immigration and Nationality Actof 1952—Cont.
Section 244, 8 U.S.C. 1254 ..... *passim*
Section 245, 8 U.S.C. 1255 6,13,17
Section 246, 8 U.S.C. 1256 17
Section 249, 8 U.S.C. 1259 17
Refuge Act of 1980, Pub. L. 96–212, 94 Stat. 102 13
Reorganization Act of 1939, Pub. L. 19, 53 Stat. 561 9
28 U.S.C. 1254(1) 2
Supreme Court Rule 20.4 2
Miscellaneous:
78 Cong. Rec. (1934):
p. 1178 1–82 7
p. 11783 7
p. 11790 7
p. 11791 7
81 Cong. Sec. 5542 17
84 Cong. Rec. 10454 (1939) 8
86 Cong. Rec. (1940):
p. 6590 9
p. 8345 9
p. 9035 10
108 Cong. Rec. 23488 (1962) 12
Crime to Promote Overthrow of Government: Hearings on H.R. 5138 Before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess. (1940) 8
H.R. 9735, 73d Cong., 2d Sess. (1934) 7
H.R. 5138, 76th Cong., 1st Sess. (1939) 7
H.R. 5138, 76th Cong., 3d Sess. (1940) 7
H.R. Doc. No. 520, 82d Cong., 2d Sess. (1952) 11
H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952) 11

Page

H.R. Rep. No. 2552, 87th Cong., 2d Sess. (1962) 11, 18
H.R. Rep. No. 96–608, 96th Cong., 1st Sess. (1979) 13
H.R. Res. 926, 94th Cong., 1st Sess. (1975) 5
H.R. Res. 49, 97th Cong., 1st Sess. (1981) 2
Reorganization Plan No. 5 9
Revision of Immigration, Naturalization and Nationality Laws: Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82nd Cong., 1st Sess. (1951) 11
S. Rep. No. 1796, 76th Cong., 3d Sess. (1940) 9
S. Rep. No. 232, 81st Cong., 1st Sess. (1949) 9
S. Rep. No. 1137, 82d Cong., 2d Sess. (1952) 11
S. Res. 40, 97th Cong., 1st Sess. (1981) 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner United States Senate respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 22, 1980.

OPINIONS BELOW

The opinion of the court of appeals (App. A, No. 80–1832, 1a–63a) is reported at 634 F.2d 408. The decisions of the immigration judge (App. B, No. 80–1832, 64a–66a; App. D, No. 80–1832, 70a–71a) and the opinion of the Board of Immigration Appeals (App. E, No. 80–1832, 72a–73a) are not reported. The judgment of the court of appeals is App. K, *infra,* 84a, to this petition.

---

[1] Jagdish Rai Chadha is also a respondent. The United States House of Representatives is filing a separate petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1980. On March 25, 1981, the court of appeals denied the petition for rehearing filed by the United States Senate and the Speaker of the United States House of Representatives (App. H, No. 80–1832, 76a).[2] This petition was filed within ninety days of the denial of rehearing, pursuant to Supreme Court Rule 20.4. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of Article I and II of the Constitution are set forth in App. J, No. 80–1832, 79a–81a. Sections 101(a)(42), 208 (a) and (b), 209(b), 243 (h)(1), 244 (a), (c) and (d), 245(a), and 246(a) of the Immigration and Nationality Act (INA) are set forth in App. L, *infra*, 85a–91a.

---

[2] On March 24, 1977, Chadha petitioned to review the deportation order of the Immigration and Naturalization Service, invoking the jurisdiction of the court of appeals under Section 106(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1105a(a), to review "all final orders of deportation." On October 27, 1977, the INS informed the court of appeals that it agreed with Chadha that Section 244(c)(2) of the INA, 8 U.S.C. 1254(c)(2), is unconstitutional, and suggested that the court invite the Senate and House to file briefs *amicus curiae*, which was done. Following its decision on December 22, 1980, the court of appeals extended to February 4, 1981, the time to petition for rehearing and to file other motions. The Senate and House authorized intervention, S. Res. 40 and H.R. Res. 49, 97th Cong., 1st Sess., and, on February 3, 1981, filed motion to intervene and petitioned for rehearing. On March 10, 1981, the court granted the motions to intervene (App. G, No. 80–1832, 75a).

STATEMENT

Respondent Chadha is a British national. He resided in Kenya, where he was born, until entering the United States on a student visa in 1966. Chadha completed his studies in 1972. Because he overstayed his visa, the respondent Immigration and Naturalization Service (INS) issued an order to show cause why he should not be deported pursuant to Section 241(a)(2) of the INA, 8 U.S.C. 1251(a)(2), as a person who "is in the United States in violation of this Act." At an administrative hearing on January 11, 1974, Chadha admitted deportability (R. 20),[3] but stated that he could not return to Kenya without a work permit, and that the British Government had established a quota for East African Asians (R. 23). His counsel asserted that there was racial persecution by the government of Great Britain against Asians from East Africa (R. 25), and even greater discrimination in Kenya (R. 26).

Chadha's allegations of racial persecution prompted the immigration judge to inquire whether Chadha wished to apply for withholding of deportation under Section 243(h) of the INA, 8 U.S.C. 1253(h)(1976), which then provided: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for

[3] References to "R. ——" are to the Certified Administrative Record reproduced in the Appendix in the court of appeals.

80-412 O - 81 - 2

such reason." The immigration judge informed respondent that "under outstanding instructions when a person applies for withholding of his deportation, the matter must be referred to the Department of State and you must justify it. . . ." (R. 27).

Respondent's counsel applied instead for suspension of deportation under Section 244 of the INA, 8 U.S.C. 1254: "The reason I propose to apply for suspension is that . . . [Chadha] has to have permanent residence . . . in order to get gainful employment" (R. 26). Under Section 244(c)(1), the Attorney General may suspend the deportation of a qualified alien and transmit to the Congress a detailed statement of facts with the reasons for the suspension. For aliens such as Chadha, who have not committed crimes or other acts which place them under Sections 244(a)(2) and (c)(3), Section 244(c)(2) provides that the Attorney General shall cancel the deportation proceedings if neither House passes a resolution which states in substance that it disfavors suspension. Section 244(d) provides that "Upon the cancellation of deportation . . . the Attorney General shall record the alien's lawful admission for permanent residence. . . ."

Chadha's application asserted that he was "unable to return to either country of birth or nationality because of immigration laws and ethnic background" (R. 46). At a hearing on February 7, 1974, the immigration judge concluded "your case is not a particularly good one for suspension of deportation. . . . I'm unable to find on the basis of the evidence submitted that Mr. Chadha would suffer the extreme hardship

required by the statute" (R. 37–38). He adjourned the proceeding so that the respondent could apply for asylum but resumed it to announce that "on further thought I think I might be inclined to grant this application for suspension of deportation" (R. 39). The immigration judge asked Chadha to withdraw the request for asylum and, in a written decision, stated: "The respondent has established that it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation. . . . Because of his race and the difficulties he would face by reason thereof, I am satisfied that his deportation would result in an extreme hardship to him" (App. B, No. 80–1832, 66a).

On December 16, 1975, the House of Representatives agreed to House Resolution 926, "That the House of Representatives does not approve the granting of permanent residence in the United States to the [six] aliens hereinafter named . . . ," including respondent Chadha (App. C, No. 80–1832, 69a). Representative Eilberg stated: "It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet the statutory requirements, particularly as it relates to hardship. . . ." (App. C, No. 80–1832, 68a).

The deportation hearing was resumed on August 4, 1976. Chadha declined to designate a country of deportation, and the immigration judge informed counsel: "I propose to order that he be deported to the United Kingdom of which he is a citizen. If you think that he will be persecuted in that country you can

either apply for asylum to the District Director or you can apply for the withholding of deportation under Section 243(h)" (R. 11). Respondent again refused to apply for asylum or the withholding of deportation and a final order of deportation was entered on November 8, 1976 (App. D, N. 80–1832, 71a).

On November 26, 1980, while the petition for review was pending in the court of appeals, Chadha's counsel notified the court that respondent had married a United States citizen on August 10, 1980. As the spouse of a citizen Chadha may now be granted permanent residence under Section 245 of the INA, 8 U.S.C. 1255. Nonetheless, Chadha's counsel stated that he had no intention of applying for adjustment of status on the basis of his marriage and that he wished to pursue the constitutional issue in this case.

On December 22, 1980, the court of appeals held that the provision for legislative review in Section 244(c)(2) is severable from the remainder of Section 244 and is unconstitutional. The court "concluded that the essence of the violation here was the violation of the separation of powers rule. . . ." (App. A, No. 80–1832, 55a). On the question of severability, the court of appeals treated Section 244(c)(2) as a nonessential condition superimposed on the authority of the Attorney General to grant permanent residence to deportable aliens. In light of the importance of the intent of Congress, we set forth here the origin of Section 244 and its subsequent amendment.

Section 244 derives from the Act of June 28, 1940, Pub. L. No. 670, § 20, 54 Stat. 670, amending Section

19 of the Immigration Act of 1917. "Until 1940 deportation of aliens illegally within the United States was mandatory. The strict rule produced harsh results in many cases. . . . The suffering caused by these laws led to urgent requests for reform. Congress responded to these requests by passing the Alien Registration Act of 1940. . . ." (App. A, No. 80–1832, 38a).

Upon taking office, Secretary of Labor Frances Perkins temporarily suspended numbers of deportation proceedings on grounds of hardship, 78 Cong. Rec. 11783 (1934), and sent legislation to the 73d Congress to authorize the Secretary of Labor to allow deportable aliens meeting certain requirements to remain in the United States. H.R. 9725, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 11781–82. The Department's bill was opposed because it "grants too much discretionary authority," *id.*, 11790 (remarks of Rep. Dirksen), and it failed decisively. *Id.*, 11791.

Proposed legislation to give the executive branch discretion to grant permanent residence to deportable aliens also failed in the 74th and 75th Congresses. It was not until a mechanism for legislative review was agreed to in the 76th Congress that the stalemate was broken.

In 1939, Representative Smith offered an amendment to H.R. 5138 to grant discretionary authority to a board in the Department of Labor to suspend deportations which would cause serious economic detriment to a dependent citizen or legally resident wife, parent, or child of a deportable alien. If the order of suspension was for longer than six months the facts should

be reported to Congress, and "upon the failure of Congress to act or resolve in respect of the case before the next adjournment or regular session . . . the order suspending deportation shall be vacated and deportation of the alien shall be immediately effected." The House agreed to the amendment, and passed the bill. 84 Cong. Rec. 10454–55 (1939).

Secretary Perkins questioned the usefulness of Representative Smith's amendment. In a letter to Senator Danaher she wrote: "[I]t does not appear that the proviso in question will accomplish anything tangible. It really adds nothing to powers not already possessed by the Department or by the Congress."[4]

The Senate Committee on the Judiciary reported a substantially revised bill which authorized the Secretary of Labor to suspend deportations and to report to Congress: "If . . . the Congress shall by Act or resolution reject the recommendation of the Secretary of Labor that official shall effect the deportation of the alien. . . . Upon the failure of Congress to act or resolve . . . the suspended order of deportation shall be vacated and deportation proceedings canceled. . . ." Section 10 of H.R. 5138, as reported with amendments on May 29, 1940.

On June 10, 1940, the Committee on the Judiciary reported a substitute bill, Senator Connally informed the Senate: "We called on the Department of Justice,

---

[4] *Crime to Promote Overthrow of Government: Hearings on H.R. 5138 Before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 3d Sess. 29 (1940).

and had the Solicitor General with us. We called in the Commissioner of Immigration and Naturalization, and together we went over all the existing laws, and worked the new provisions into the existing laws, so as to make a harmonious whole." 86 Cong. Rec. 8345 (1940).

The Committee substitute provided that the Attorney General [5] may suspend deportations of qualified individuals and report to Congress. "If during that session the two Houses pass a concurrent resolution stating in substance that the Congress does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien. . . . If during that session the two Houses do not pass such a resolution, the Attorney General shall cancel deportation proceedings . . . [and] the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States. . . ." S. Rep. No. 1796, 76th Cong., 3d Sess. 5–6 (1940). The conference agreed to the Senate bill,

---

[5] On May 22, 1940, President Roosevelt proposed the transfer of the Immigration and Naturalization Service to the Department of Justice pursuant to Reorganization Plan No. 5, 86 Cong. Rec. 6590 (1940). Under Section 5 of the Reorganization Act of 1939, Pub. L. No. 19, 53 Stat. 561, the plan was subject to disapproval by a concurrent resolution of the Senate and House.

The Department of Justice supports the constitutionality of congressional review of reorganization proposals and has cited congressional review of the grant of permanent residence to deportable aliens as precedent for its conclusion. S. Rep. No. 232, 81st Cong., 1st Sess. 20–21 (1949) (text of memorandum from the Department of Justice).

and Representative Celler championed the conference report on the House floor:

> In the original act provision was made for the suspension of deportation in hardship cases. But that suspension could be effected only by a specific act of Congress in each specific case. It would have been impossible to get both Houses to act in that fashion. . . . But the conferees have now seen the light and have provided that the Attorney General shall have the discretionary power to suspend deportation in these hardship cases. His action shall not be vetoed or gainsaid unless Congress specifically vetoes or cancels his waiver of deportation or suspension of deportation in each case. This is a great difference. It makes the act humane and reasonable. It was inhumane and unreasonable before.

86 Cong. Rec. 9035 (1940). President Roosevelt approved the bill on June 28, 1940.

In 1948, the Congress provided that deportation proceedings may be canceled only if "the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation. . . . Pub. L. No. 863, 62 Stat. 1206 (1948). President Truman approved the bill on July 1, 1948.

In 1952, the Senate and House Committees on the Judiciary reported bills with identical provisions for congressional review. For certain classes of aliens, "the Attorney General is required to report each case in which he suspends deportation . . . to the Congress and the adjustment of status will become final

in absence of adverse action by either the Senate or House of Representatives." S. Rep. No. 1137, 82d Cong., 2d Sess. 24 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 62 (1952). For "a deportable alien of a criminal, subversive, immoral, or narcotic class or who overstays his period of admission . . . the adjustment does not become effective unless Congress affirmatively approves the adjustment by a concurrent resolution. . . ." S. Rep. No. 1137 at 25; H.R. Rep. No. 1365 at 62.[6] Both Houses agreed to these provisions. President Truman's unsuccessful veto message stated objections to other portions of the bill, which became the Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163. He stated no objection to the provisions for legislative review. H.R. Doc. No. 520, 82d Cong., 2d Sess. (1952).

The current form of Section 244 was enacted in 1962. The managers for the House stated: "[U]nder the language agreed to by the committee of conference, the granting of relief will be subject to congressional review. . . ." H.R. Rep. No. 2552, 87th Cong., 2d Sess. 4 (1962).[7] Senator Keating, a conferee, explained:

[6] The Deputy Attorney General and the Acting Commissioner of the Immigration and Naturalization Service submitted their views on the legislation: neither objected to the form or principle of congressional review, *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcommittees of the Committee on the Judiciary on S. 716, H.R. 2379, and H.R. 2816*, 82d Cong., 1st Sess. 280-88, 711-22 (1951).

[7] The conference agreement substantially liberalized the availability of relief to aliens, such as Chadha, who overstay nonimmigrant visas. Under the Immigration and Nationality Act of 1952, a concurrent resolution of approval was necessary

80-412 O - 81 - 3

"Should the Attorney General believe the application meritorious, he would recommend suspension of deportation to the Congress as under present law, and the Congress by resolution could approve the recommendation, suspend the alien's deportation, and adjust his status to that of permanent residence." 108 Cong. Rec. 23448–49 (1962). President Kennedy approved the bill on October 24, 1962. Pub. L. No. 87–885, 76 Stat. 1247 (1962).

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS RENDERED AN UNNECESSARY JUDGMENT ON THE CONSTITUTIONALITY OF AN ACT OF CONGRESS

The court of appeals unnecessarily decided the constitutionality of Section 244 when two nonconstitutional avenues of relief for Chadha necessitated a remand to the Immigration and Naturalization Service for reconsideration. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *New York City Transit*

---

to grant permanent residence to an alien who was deportable "as a person who has remained longer in the United States than the period for which he was admitted." Sections 244(a)(5)and (c); 66 Stat. 215–16 (1952). The conference agreement in 1962 brought aliens who overstay their visas within the provisions of a new Section 244(a)(1); they are granted permanent residence if neither House objects to the recommendation of the Attorney General.

Authority v. *Beazer*, 440 U.S. 568, 582 (1979), *quoting Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

First, Chadha married a United States citizen on August 10, 1980. Section 245 of the INA authorizes the Attorney General to grant permanent residence to Chadha as the spouse of a citizen. The immigration judge in Chadha's case had told him that "if you married you would have no difficulty in having your status adjusted" (R. 38). Upon learning of Chadha's marriage, the court of appeals should have remanded the case to INS to reconsider the need for suspension of deportation.

Second, Chadha's allegation of a threat of persecution in the United Kingdom or Kenya provides him with another nonconstitutional avenue of relief. With the passage of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102, it can no longer be said that "the Attorney General will deport [Chadha] should his challenge fail" (App. A, No. 80–1832, 17a).

Prior to the 1980 Act, the Attorney General was "authorized to withhold deportation" under Section 243(h) of the INA. Now the Attorney General "shall not deport" when he determines that a claim of racial persecution is well-founded. Section 203(e) of the Refugee Act, amending Section 243(h) of the INA; H.R. Rep. No. 96–608, 96th Cong., 1st Sess. 18 (1979).[8] If the Attorney General believes that

[8] Under INS precedent the correct remedy for Chadha has always been the withholding of deportation under Section 243(h). See *Matter of Kojoory*, 12 I. & N. Dec. 215, 19–20 (1967)

Chadha's fear of racial persecution is well-founded, he must withhold the deportation order on which the jurisdiction of the court of appeals rested.[9] After the passage of the Refugee Act Chadha's case "assume[s] a posture quite different from the one now presented," *Thorpe* v. *Housing Authority,* 386 U.S. 670, 673 (1967), and a remand is required. *See INS* v. *Stanisic,* 395 U.S. 62, 79 (1969).

The court of appeals brushed aside the availability of alternative relief by making Chadha a permanent resident of the United States retroactive to 1974 when his deportation was suspended (App. A, No. 80–1832, 18a (fn. 6)). This fiat violates the plain language of Section 244(d) that the Attorney General shall record an alien's admission for permanent residence "[u]pon the cancellation of deportation," which may not occur until there has been favorable congressional

---

("Where a respondent cannot establish the necessary hardship for suspension, we do not believe that a claim of persecution should be used to make up the deficit. The remedy available where the likelihood of persecution can be satisfactorily established is a stay of deportation under section 243(h)").

[9] The 1980 Act also authorizes the Attorney General to grant asylum to aliens who fear persecution in the country of their nationality or residence until he "determines that the alien is no longer a refugee . . . owing to a change in circumstances in the alien's country of nationality. . . ." Section 201(b) of the Refugee Act, adding Section 208 of the INA. It additionally gives discretion to the Attorney General to grant permanent residence to 5,000 refugees annually one year afer the grant of asylum. Section 201(b) of the Refugee Act, adding Section 209(b) of the INA. The authority to withhold deportation, grant asylum, and adjust the status of refugees is not subject to legislative review.

review pursuant to Section 244(c).[10] There is no statutory basis for the relief granted by the court and its decision to rewrite the statute in order to reach the constitutional question was unwarranted.

II

THE DECISION OF THE COURT OF APPEALS ON SEVERABILITY PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

The role of the Congress in determining whether permanent residence should be granted to deportable aliens is an inseverable part of Section 244. The court of appeals believed that Subsection 244(a) is an independent source of final executive authority "to suspend deportation and adjust the status" of deportable aliens (App. A, No. 80–1832, 15a–16a). But Subsection 244(a) merely introduces the full section, states the categories of aliens who are eligible

[10] The Congress has given explicit consideration to the date on which an alien shall become a permanent resident if his deportation is cancelled. The first statutory authority for the cancellation of deportation provided that "Upon the cancelation of such proceedings . . . the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States. . . ." Act of June 28, 1940, Pub L. No. 670, § 20, 54 Stat. 670, 672. The provision for the retroactive grant of permanent residence was retained in the Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206. The dating of permanent residence was changed in the Immigration and Nationality Act of 1952, and Section 244(d) provides that "the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made. . . ." The relief decreed by the court of appeals—the dating of permanent residence back to the suspension of deportation—is a judicial invention.

for relief, and provides threshold eligibility criteria. The grant of limited power to the Attorney General is "[a]s hereinafter prescribed in this section. . . ." The authority to suspend deportation is provided in Subsection 244(c)(1), rather 244(a), and is properly characterized as a "deferment of deportation." *McGrath* v. *Kristensen*, 340 U.S. 162, 168 (1950). The only authority to "cancel deportation proceedings" is in Subsection 244(c)(2), the very provision which the court of appeals invalidated. The recording of the alien's lawful admission for permanent residence, Subsection 244(d), occurs "[u]pon the cancellation of deportation" under Subsection 244(c)(2). Speaking of the antecedent of Subsection 244(c)(3), this Court recognized that "deportation finally cancels only if Congress affirmatively approves the suspension by a favorable concurrent resolution. . . ." *Jay* v. *Boyd*, 351 U.S. 345, 351 (1956).

The history of Section 244 confirms that Congress always intended legislative review to be indispensable to the grant of permanent residence on the ground of hardship. In three successive Congresses, the 73d, the 74th, and the 75th, proposals to grant discretion to the executive branch were defeated. The breakthrough was achieved in 1940 by the adoption of a requirement for congressional review. The 1940 Act added a single section containing both the delegation of limited authority to the Attorney General and the procedure for congressional review. *Cf. United States* v. *Jackson*, 390 U.S. 570, 586–89 (1968) (provision severable when adopted as subsequent amendment to the underlying provision).

All events after 1940 underscore the intention of Congress that legislative review is inseparable from the authority delegated to the Attorney General. The Congress has amended the provision for suspension and cancellation three times since 1940; each amendment has provided for a form of congressional review. The severability decision of the court of appeals depends on the choice of the drafters of the Immigration and Nationality Act of 1952 to organize Section 244 into subsections, but the wording and legislative history of Section 244 preserves the integral role of legislative review.[11]

The intent of Congress is also expressed in the 1962 amendment to Section 244 which establishes its current text: "Under the language agreed to by the committee of conference, the granting of relief will be subject to congressional review. . . ." H.R. Rep. No. 2552, 87th Cong., 2d Sess. 4 (1962).[12]

---

[11] The one reference which the court of appeals makes to the long legislative history of Section 244 is to remarks of Representative Dies in 1937, three years before the passage of the 1940 Act (App. A, No. 80–1832, 15a). Representative Dies was speaking in favor of a bill which would have given final authority to the Attorney General, not subject to legislative review, to grant permanent residence to a limited number of deportable aliens, 8,000 in all, over a four-year period. 81 Cong. Rec. 5542 (1937). The bill passed the House but was not voted on in the Senate.

[12] The intention of the Congress in Section 244 is emphasized by Section 246 of the INA, 8 U.S.C. 1256, which was also enacted as part of the Immigration and Nationality Act of 1952. Section 246 provides for the rescission of permanent residence when the Attorney General subsequently determines that individuals who were granted adjustment had not been eligible for it. Section 246 provides that if adjustment occurred under Section 244, rescission requires congressional approval. If adjust-

No opinion of this Court on severability is precedent for the dissection performed by the court of appeals. In none of the leading cases—*Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234-35 (1932), *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 433-39 (1938), and *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976)—was the challenged authority enacted as a limitation on authority delegated under the statute.[13] The decision of the court of appeals is inconsistent with the principle voiced by the Fourth Circuit:

> When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent.

McCorkle v. *United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). The procedures of Section 244 are an inseverable whole and the effort of the court of appeals to take them apart should be reviewed on certiorari.

ment occurred under Section 245 and 249, rescission does not require congressional approval. The reason for the contrast is clear. The Attorney General lacks authority to rescind permanent residence granted under Section 244 because the grant did not occur by his authority, but by favorable congressional review; he has authority to rescind adjustments under Sections 245 and 249 because he had final authority to grant those adjustments originally.

---

[13] "Where the focus of legislation was on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart apart from the procedure for its enforcement." *Arnett* v. *Kennedy*, 416 U.S. 134, 152 (1974).

III

CERTIORARI SHOULD BE GRANTED TO REVIEW THE DECISION OF THE COURT OF APPEALS THAT SECTION 244 IS UNCONSTITUTIONAL

We agree with appellant Immigration and Naturalization Service in No. 80–1832 that this case presents fundamental constitutional issues. The reasons why the question on appeal in No. 80–1832 is substantial are also reasons why certiorari should be granted.

The court of appeals "concluded that the essence of the violation here was the violation of the separation of powers rule. . . ." (App. A, No. 80–1832, 55a). The court acknowledged that:

> no circuit or Supreme Court authority we have found holds the Legislature has impermissibly invaded the prerogative of the Executive or the Judiciary absent a clause in the Constitution which confers the powers upon another branch with great specificity.

Id., 25a (citations omitted). The court could find no clause, such as the Appointments Clause, see *Buckley* v. *Valeo*, 424 U.S. 1, 118 (1976), and so it reasoned generally about the nature of executive and judicial functions. It concluded that Section 244 interferes with executive and judicial functions, but there is no citation to any actual interference with the consistent administration of the statute by the executive branch or the limited functions of the judicial branch under the INA during the forty-year history of Section 244 and its predecessor.

If the merits are reached, the proper starting point is the power which the Congress is implementing in Section 244 and its authority to implement that power under the Necessary and Proper Clause. "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972), *quoting Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909). The objective of Congress—the amelioration of the hardship of the deportation laws—is certainly within the constitutional power of the Congress.

The respondents assert that the means chosen to achieve this legitimate and humane objective are prohibited, namely by the principle of bicameralism and the requirement in the Presentation Clause, Art. I, Sec. 7, cl. 3, that "Every . . . Resolution . . . to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States. . . ."

Section 244 of the Immigration and Nationality Act of 1952, prior to the 1962 amendment to the Act, required that permanent residence for aliens who overstay nonimmigrant visas, as Chadha did, be approved by concurrent resolution of both Houses. The 1962 amendment facilitates the grant of permanent residence to such aliens by providing for permanent residence if neither House objects. The respondents do not say that the requirement for affirmative bicameral approval in the 1952 Act is constitutionally preferable to the 1962 amendment, for a requirement of affirmative bi-

cameral approval gives to either House the power to reject the Attorney General's recommendation.[14] Rather, the heart of respondent's case is that the Presentation Clause limits the Congress to two choices: the delegation of complete discretion to the Attorney General, or the denial of any discretion to him and the presentation to the President of a bill for each alien who should be granted relief from deportation.

The requirements of the Presentation Clause have been met by Section 244. Four presidents—President Roosevelt in 1940, President Truman in 1948, President Eisenhower in 1957,[15] and President Kennedy in 1962—have approved bills which provide for submission to the Congress of the question whether deportable aliens should be granted permanent residence. Each had available to him the power under the Presentation Clause to object to legislation which would circumvent the clause, and each approved of procedures which leave to the Congress the decision whether to grant permanent residence to deportable aliens.

---

[14] Section 244(c)(3) of the INA provides that the deportation of an alien who is deportable because of criminal activity, and other specified grounds, may be cancelled only upon a favorable concurrent resolution of the Congress. The validity of Section 244(c)(3) is thrown into doubt by the sweeping decision of the court of appeals, even though it fully complies with the principle of bicameralism and expresses the special concern of the Congress over the grant of permanent residence to persons with criminal records.

[15] President Eisenhower approved the Act of September 11, 1957, Pub. L. No. 85-316, § 13, 71 Stat. 642, U.S.C. 1255b.

Section 244 is an accommodation between the political branches to bring humanity into an otherwise inflexible deportation law. The court of appeals relied on an abstract theory of separation of powers to set aside this accommodation in disregard of this Court's admonition that "[t]he reasons which preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." *Mathews* v. *Diaz,* 426, U.S. 67, 81–82 (1976) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL DAVIDSON,
Senate Legal Counsel.
M. ELIZABETH CULBRETH,
Deputy Senate Legal Counsel.
PAULA A. SWEENEY,
CHARLES TIEFER,
Assistant Senate Legal Counsel.

JUNE 1981.

APPENDIX K*

United States Court of Appeals for the Ninth Circuit

No. 77-1702

JAGDISH RAI CHADHA, PETITIONER

v.

IMMIGRATION & NATURALIZATION SERVICE, RESPONDENT

JUDGMENT—I&NS No. A17-385-958

[SAN FRANCISCO]

Upon Petition to Review an order of the Immigration and Naturalization Service

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the deportation proceedings of the I&NS in this Cause be, and hereby is cancelled.

Filed and entered: December 22, 1980.

*The appendices to the petition are lettered and paginated consecutively to the appendices to the jurisdictional statement in No. 80-1832.

APPENDIX L

Statutory Provisions Involved

1. Section 101(a)(42) of the INA, 8 U.S.C. 1101(a)(42), provides:

As used in this Act—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social

group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Section 208 (a) and (b) of the INA, 8 U.S.C. 1158 (a) and (b), provides:

(a) The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

(b) Asylum granted under subsection (a) may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 101(a)(42)(A) owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided.

3. Section 209(b) of the INA, 8 U.S.C. 1159(b), provides:

(b) Not more than five thousand of the refugee admissions authorized under section 207(a) in any fiscal year may be made available by the Attorney General, in the Attorney General's discretion and

under such regulations as the Attorney General may prescribe, to adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—

(1) applies for such adjustment,

(2) has been physically present in the United States for at least one year after being granted asylum,

(3) continues to be a refugee within the meaning of section 101(a)(42)(A) or a spouse or child of such a refugee,

(4) is not firmly resettled in any foreign country, and

(5) is admissible (except as otherwise provided under subsection (c)) as an immigrant under this Act at the time of examination for adjustment of such alien.

Upon approval of an application under this subsection, the Attorney General shall establish a record of the alien's admission for lawful permanent residence as of the date one year before the date of the approval of the application.

4. Section 243(h)(1) of the INA, 8 U.S.C. 1253 (h)(1), provides:

(h)(1) The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(19) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

5. Section 244 (a), (c) and (d) of the INA, 8 U.S.C. 1254 (a), (c) and (d), provides:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a); has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * * * *

(c)(1) Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

(3) In the case of an alien specified in paragraph (2) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel

deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

(d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made, and unless the alien is an immediate relative within the meaning of section 201(b) the Secretary of State shall reduce by one the number of nonpreference immigrant visas authorized to be issued under section 203(a)(7) for the fiscal year then current.

6. Section 245(a) of the INA, 8 U.S.C. 1255(a), provides:

(a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

7. Section 246(a) of the INA, 8 U.S.C. 1256(a), provides:

(a) If, at any time within five years after the status of a person has been adjusted under the provisions of section 244 of this Act or under section 19(c) of the Immigration Act of February 5, 1917, to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall submit to the Congress a complete and detailed statement of the facts and pertinent provisions of law in the case. Such reports shall be submitted on the first and fifteenth day of each calender month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution withdrawing supsension of deportation, the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made.

U.S. GOVERNMENT PRINTING OFFICE: 1981

Office - Supreme Court, U.S.
FILED
NOV 19 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1832, 80-2170, and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE UNITED STATES SENATE, APPELLEE-PETITIONER

MICHAEL DAVIDSON,
Senate Legal Counsel,
M. ELIZABETH CULBRETH,
Deputy Senate Legal Counsel,
CHARLES TIEFER,
MORGAN J. FRANKEL,
Assistant Senate Legal Counsels,
1413 Dirksen Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435

QUESTIONS PRESENTED

1. Whether the court of appeals rendered an unnecessary judgment on the constitutionality of section 244(c)(2) of the Immigration and Nationality Act ("INA") by failing to remand to the Immigration and Naturalization Service ("INS") to determine the availability of statutory relief following the alien respondent's marriage to a United States citizen and the passage of the Refugee Act of 1980.

2. Whether a court of appeals has jurisdiction in a case brought under section 106(a) of the INA to resolve the constitutionality of section 244(c)(2).

3. Whether the inseverability of section 244 deprives the alien respondent of standing to challenge the constitutionality of the legislative review procedure in section 244(c)(2), by eliminating any statutory basis for the grant of relief by the court of appeals.

4. Whether section 244(c)(2), under which permanent residence is granted to deportable aliens only after legislative review, is a constitutional means of implementing the power of Congress over the admission of aliens.*

*The Senate relies on the brief of the House of Representatives for the argument of the additional questions presented in the petitions for certiorari.

TABLE OF CONTENTS

	Page
Questions Presented	1
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Summary of Argument	6
Argument:	
I. The History of Section 244 Demonstrates That Congress Intended to Preserve its Authority Over the Grant of Permanent Residence to Deportable Aliens	9
1. The Administration of President Roosevelt	10
2. The Administration of President Truman	13
3. The Administration of President Eisenhower	15
4. The Administration of President Kennedy	16
II. Fundamental Rules of Judicial Restraint Require a Remand to Consider the Availability of Statutory Relief	17
III. The Court of Appeals Lacked Jurisdiction Under Section 106(a)	21
IV. Because Section 244(c)(2) is Inseverable There is No relief WhichMay be Provided	24
V. Section 244(c)(2) is Constitutional	28
Conclusion	34
Addenda:	
1. Statutes with Provisions Authorizing Congressional Review	39
A. Foreign Affairs and National Security	39
B. Budget	41

Addenda—Continued Page

C. International Trade 41
D. Energy 41
E. Rulemaking 44
F. Miscellaneous 47
2. Congressional Disapproval Under Section 244: 1953–1981 49

TABLE OF AUTHORITIES

Cases:

Afroyim v. *Rusk*, 387 U.S. 253 (1967) 25
Arnett v. *Kennedy*, 416 U.S. 134 (1974) 27
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 19
Asimakopoulos v. *INS*, 445 F. 2d 1362 (9th Cir. 1971) 9, 30
Atkins v. *United States*, 556 F. 2d 1028 (Ct. Cl.), *cert. denied*, 434 U.S. 1009 (1977) 34
Buckley v. *Valeo*, 424 U.S. 1 (1976) 28, 33
Cheng Fan Kwok v. *INS*, 392 U.S. 206 (1968) 8, 22, 23
Clark v. *Valeo*, 559 F. 2d 642 (D.C. Cir.), *aff'd mem. sub nom.*, *Clark* v. *Kimmitt*, 431 U.S. 950 (1977) . 20, 21, 23, 27, 34
Currin v. *Wallace*, 306 U.S. 1 (1939) 12
Dastmalchi v. *INS*, No. 80–2432 (3rd Cir. Sept. 17, 1981) 8, 21, 22
Electric Bond & Share Co. v. *SEC*, 303 U.S. 419 (1938) 24, 25
Elkins v. *Moreno*, 435 U.S. 647 (1978) 18
Foti v. *INS*, 375 U.S. 217 (1963) 21, 22, 23
Giova v. *Rosenberg*, 379 U.S. 18 (1964) 22
Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792) 30
INS v. *Stanisic*, 395 U.S. 62 (1969) 19
INS v. *Wang*, 450 U.S. 139 (1981) 31
Jay v. *Boyd*, 351 U.S. 345 (1956) 25
J. W. Hampton, Jr., & Co. v. *United States*, 276 U.S. 394 (1928) 34
Lewis v. *United States*, 445 U.S. 55 (1980) 24
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 31

Cases—Continued Page
McCorkle v. *United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978)..... 8, 23, 27
McGrath v. *Kristensen*, 340 U.S. 162 (1950)..... 24, 31
McMullen v. *INS*, 658 F.2d 1312 (9th Cir. 1981).. 18
Myers v. *United States*, 272 U.S. 52 (1926)..... 28
New York City Transit Authority v. *Beazer*, 440 U.S. 568 (1979)..... 19
New York Times Co. v. *United States*, 403 U.S. 713 (1971) 25
Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977) 8, 28, 31, 32, 34
Nixon v. *Administrator of General Services*, 408 F. Supp. 321 (D.D.C. 1976)..... 30, 34
Oceanic Steam Navigation Co. v. *Stranahan*, 214 U.S. 320 (1909)..... 31
Rassano v. *INS*, 377 F.2d 971 (7th Cir. 1967)..... 22
Rosenberg v. *Fleuti*, 374 U.S. 449 (1963)..... 18
Spector Motor Service, Inc. v. *McLaughlin*, 323 U.S. 101 (1944) 19
Thorpe v. *Housing Authority*, 386 U.S. 670 (1967). 19
United States v. *Jackson*, 390 U.S. 570 (1968).... 25
United States v. *Nixon*, 418 U.S. 683 (1974)..... 30
United States v. *Richardson*, 418 U.S. 166 (1974).. 27
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 25
Administrative Decisions:
Matter of Arai, 13 I. & N. Dec. 494 (1970)..... 18
Matter of Kojoory, 12 I. & N. Dec. 215 (1967)..... 19
Constitution, Statutes, and Rules:
Art. I, Sec. 7..... 34
Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206.. 14
Act of September 11, 1957, Pub. L. No. 85–316, 71 Stat. 639 16
Act of October 24, 1962, Pub. L. No. 87–885, 76 Stat. 1247 17
Act of December 17, 1980, Pub. L. No. 96–539, 94 Stat. 3196..... 23

Constitution, Statutes, and Rules—Continued Page
Alien Registration Act of 1940, Pub. L. No. 670, 54 Stat. 670 ..... 13, 14, 20
Congressional Budget and Impoundment Control Act of 1974, 13 U.S.C. 1403..... 17
Displaced Persons Act of 1948, Pub. L. No. 774, 62 Stat. 1009..... 15
Federal Trade Commission Improvements Act of 1980, 15 U.S.C.A. § 57a–1(f) (Supp. 1981)..... 23
H.J. Res. 551, 54 Stat. 230 (1940)..... 12
Immigration Act of 1924, Pub. L. No. 139, 43 Stat. 153 10
Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 8 U.S.C. 1101 *et seq.*, as amended:
Section 101(a)(42), 8 U.S.C. 1101(a)(42).... 18
Section 106(a), 8 U.S.C. 1105a(a). 2, 7, 8, 21, 22, 23
Section 208, 8 U.S.C. 1158..... 18
Section 209(b), 8 U.S.C. 1159(b)..... 18
Section 212, 8 U.S.C. 1182..... 32
Section 241, 8 U.S.C. 1251..... 32
Section 241(a)(2), 8 U.S.C. 1251(a)(2)..... 3
Section 242(b), 8 U.S.C. 1252(b).. 3, 7, 8, 21, 22, 23
Section 243(a), 8 U.S.C. 1253(a)..... 19
Section 243(g), 8 U.S.C. 1253(g)..... 19
Section 243(h), 8 U.S.C. 1253(h); 8 U.S.C. 1253(h)(1) (Supp. 1981)..... 19
Section 244, 8 U.S.C. 1254.....passim
Section 245, 8 U.S.C. 1255..... 18, 26
Section 246, 8 U.S.C. 1256..... 26
Section 249, 8 U.S.C. 1259..... 17
Section 406, 8 U.S.C. 1101 note..... 25
International Development and Food Assistance Act of 1975, 22 U.S.C. 2151n..... 17
International Security Assistance and Arms Exports Control Act of 1976, 22 U.S.C. 2776(b).... 17
Omnibus Rivers and Harbors Act, Pub. L. No. 89–298, 79 Stat. 1073..... 30

Constitution, Statutes, and Rules—Continued Page
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 ..... 7, 16
Refugee Relief Act of 1953, Pub. L. No. 203, 67 Stat. 400 16
Reorganization Act of 1939, Pub. L. No. 19, 53 Stat. 561 ..... 12, 14, 16, 33
War Powers Resolution, 50 U.S.C. 1544(c) 17
5 U.S.C. 906(a) (Supp. III 1979) 33
8 U.S.C. 1255b 16
28 U.S.C. 1254(1) 2
Supreme Court Rule 16.8 2
Congressional Documents:
78 Cong. Rec. (1934)
p. 11783 10
p. 11790 10
p. 11791 10
81 Cong. Rec. (1937)
p. 4652 11
p. 5542 25
p. 5574 11
83 Cong. Rec. (1938)
p. 4487 12
pp. 8992-96 11
84 Cong. Rec. (1939)
pp. 2477-79 12
p. 2957 12
p. 3036 12
p. 3093 12
p. 10455 ..... 11, 29
86 Cong. Rec. (1940)
p. 8345 14
p. 9035 13
95 Cong. Rec. (1949)
p. 3822 14
98 Cong. Rec. (1952)
p. 9756 15

Congressional Documents—Continued Page

102 Cong. Rec. (1956)
p. 12958 16
103 Cong. Rec. (1957)
p. 1509 16
108 Cong. Rec. (1962)
p. 22607 17
126 Cong. Rec. (Dec. 1, 1980)
p. H11424 28
Crime to Promote Overthrow of Government: Hearing on H.R. 5138 Before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess. (1940) 11
Regulating Powers of Attorney General to Suspend Deportation of Aliens: Hearings Before the Subcommittee on Immigration of the House Committee on the Judiciary on H.R. 245, H.R. 674, H.R. 1115, and H.R. 2933, 80th Cong., 1st Sess. (1947). 13
Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcommittees of the Committee on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess. (1951) 15
H.R. 3875, 81st Cong., 1st Sess. (1949) 14
H.R. 9725, 73d Cong., 2d Sess. (1934) 10
H.R. 8163, 74th Cong., 1st Sess. (1935) 10
H.R. 6391, 75th Cong., 1st Sess. (1937) 11
H.R. 5138, 76th Cong., 1st Sess. (1939) 11, 12
H.R. 4425, 76th Cong., 1st Sess. (1939) 12
H.R. 2933, 80th Cong., 1st Sess. (1947) 13
H.R. Res. 350, 74th Cong., 1st Sess. (1935) 11
H.R. Res. 926, 94th Cong., 1st Sess. (1975) 5
H.R. Res. 49, 97th Cong., 1st Sess. (1981) 6
S. 2969, 74th Cong., 1st Sess. (1935) 10
S. 3167, 84th Cong., 2d Sess. (1956) 16
S. 343, 85th Cong., 1st Sess. (1957) 16
S. 1006, 85th Cong., 1st Sess. (1957) 16
S. 3361, 87th Cong., 2d Sess. (1962) 17

Congressional Documents—Continued Page

S. Res. 40, 97th Cong., 1st Sess. (1981) 6
H.R. Doc. No. 392, 74th Cong., 2d Sess. (1936) 11, 29
H.R. Doc. No. 520, 82d Cong., 2d Sess. (1952) 15
H.R. Doc. No. 329, 84th Cong., 2d Sess. (1956) 16
H.R. Doc. No. 85, 85th Cong., 1st Sess. (1957) 16
H.R. Rep. No. 1110, 74th Cong., 1st Sess. (1945) .. 10
H.R. Rep. No. 1110 (Part 2), 74th Cong., 1st Sess. (1935) 10
H.R. Rep. No. 120, 76th Cong., 1st Sess. (1939) ... 12
H.R. Rep. No. 647, 80th Cong., 1st Sess. (1947) ... 13
H.R. Rep. No. 362, 81st Cong., 1st Sess. (1949) 14
H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952) 26
H.R. Rep. No. 2552, 87th Cong., 2d Sess. (1962) .. 17
H.R. Rep. No. 1301, 96th Cong., 2d Sess. (1980) .. 28
S. Rep. No. 1721, 76th Cong., 3d Sess. (1940) 12
S. Rep. No. 1796, 76th Cong., 3d Sess. (1940) 13
S. Rep. No. 1204, 80th Cong., 2d Sess. (1948) 13
S. Rep. No. 232, 81st Cong., 1st Sess. (1949) 14, 33
S. Rep. No. 1515, 81st Cong., 2d Sess. (1950) 14
S. Rep. No. 1137, 82d Cong., 2d Sess. (1952) 15
S. Rep. No. 859, 96th Cong., 2d Sess. (1980) 28

Miscellaneous:

Public Papers of the Presidents (Hoover) p. 432 (1929) 16
Public Papers of the Presidents (Truman) p. 384 (1948) 15
Public Papers of the Presidents (Eisenhower) pp. 232, 672 (1957) 16
Public Papers of the Presidents (Kennedy) p. 251 (1961); pp. 6, 196 (1963) 16
Public Papers of the Presidents (Johnson) p. 1083 (1965) 30
6 Op. Att'y Gen. 680 (1854) 33
37 Op. Att'y Gen. 56 (1933) 27
43 Op. Att'y Gen. No. 10 (1977) 34
44 Fed. Reg. 36187 (1979) 32
46 Fed. Reg. 9119 (1981) 32

86-484 O - 81 - 2

Page

Miscellaneous—Continued

Mansfield, *The Legislative Veto and the Deportation of Aliens*, 1 Pub. Ad. Rev. 281 (1941)..... 13

5 J. Elliot, Debates on the Adoption of the Federal Constitution (1968 ed.)..... 33

J. Sundquist, The Decline and Resurgence of Congress (1981)..... 26

Kenya Independence Order in Council, S.I. 1963/1968, sched. 2, c.l., §§ 1, 2..... 2

United Kingdom Immigration Act, 1971 § 3..... 4

Gt. Britain, Home Office, *Control of Immigrants Statistics, United Kingdom, 1980*, 28 Cmnd. No. 8199 (1981)..... 4

In the Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 80-1832, 80-2170, 80-2171

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE UNITED STATES SENATE, APPELLEE-PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.S. 1a–63a) is reported at 634 F.2d 408. The decisions of the INS special inquiry officer (J.S. 64a–66a, 70a–71a) and the opinion of the Board of Immigration Appeals (J.S. 72a–73a) are not reported. The judgment of the court of appeals is reprinted in the Senate petition for certiorari at 84a.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1980. On March 25, 1981, the court of appeals denied the petition of the Senate and House for rehearing (J.S. 76a). The petitions of the Senate and House for certiorari were granted on October 5, 1981, and consolidated with No. 80–1832, the appeal of the Immigration and Naturalization Service ("INS"). The question of jurisdiction in No. 80–1832 was postponed.[1] This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of Articles I and II of the Constitution are set forth in the House petition at 27–28.

2. The pertinent portion of section 106(a) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. 1105a(a), is set forth in the House petition at 29.

3. Sections 244(a), (c), and (d) of the INA, 8 U.S.C. 1254(a), (c), and (d), and other pertinent provisions of the INA, are set forth in the Senate petition at 85a–91a.

STATEMENT OF THE CASE

Jagdish Rai Chadha was born in Kenya and lived there until he entered the United States as a nonimmigrant student in September, 1966. In December, 1963, Kenya became independent from Great Britain. All persons born in Kenya prior to independence automatically became citizens, except for those whose parents had not been born there. Those persons were entitled until December, 1965, to register as citizens.[2] Chadha, who is "of Indian origin" (J.A. 38), did not become a Kenyan citizen and entered the United States on a British passport which stated that he was a "Citizen of the United Kingdom and Colonies" (J.A. 20). He obtained degrees from Bowling

[1] Rule 16.8 of this Court requires that the question of jurisdiction be addressed first. We rely on the argument of the House of Representatives on this point. *See* House brief at 15–18.

[2] Kenya Independence Order in Council, S. I. 1963/1968, sched. 2, c. 1, §§ 1, 2.

Green State University and overstayed his student visa when it expired in June, 1972.

On October 11, 1973, the INS ordered Chadha to show cause why he should not be deported pursuant to section 241(a)(2) of the INA, 8 U.S.C. 1251(a)(2), for having "remained in the United States for a longer time than permitted" (J.A. 6). At a hearing on January 11, 1974, held pursuant to section 242(b) of the INA, 8 U.S.C. 1252(b), his counsel admitted that Chadha was "deportable as charged" (J.A. 10), but expressed fear of racial persecution if Chadha were deported to either Great Britain or Kenya. The INS officer asked whether Chadha wished to apply for withholding of deportation under section 243(h) of the INA, 8 U.S.C. 1253(h), which then authorized, but did not require, the Attorney General to withhold the deportation of any alien who would be subject to persecution on account of race.[5] Chadha's counsel preferred to apply for suspension of deportation under section 244 of the INA, 8 U.S.C. 1254, because Chadha "has to have permanent residence . . . in order to get gainful employment" (J.A. 17–18).

Section 244(a)(1) and (2) establish the qualifications for relief under 244. Section 244(a)(1) establishes general eligibility requirements, while section 244(a)(2) establishes more stringent requirements for aliens who are deportable for criminal and other specified reasons. The general eligibility requirements in section 244(a)(1) are residence in the United States for seven years, good character, and a showing that deportation would result in "extreme hardship" to the alien or his citizen or permanent resident spouse, parent, or child.

Section 244(c)(1) provides that upon the application of an alien eligible under section 244(a), the Attorney General may suspend deportation and report the facts and reasons for suspension to the Congress. For aliens covered by section 244(a)(2), section 244(c)(3) provides that suspended deportations may be canceled only upon affirmative approval by a concurrent

[5] The INS officer told Chadha's counsel that "under outstanding instructions when a person applies for the withholding of his deportation, the matter must first be referred to the Department of State and you must justify it" (J.A. 19).

resolution of the Congress.[4] For aliens who are covered by section 244(a)(1), section 244(c)(2) requires cancellation of deportation if neither House passes a resolution of disapproval before the end of the session following the suspension. Section 244(d) grants permanent residence upon the cancellation of deportation.

Chadha stated, in applying for permanent residence under section 244, that he was "unable to return to either country of birth or nationality because of immigration laws and ethnic background" (J.A. 35).[5] In a "Statement of Hardships," his counsel asserted that deportation would disrupt Chadha's "personal ties" and "his complete cultural and societal integration with American norms of living." He also contended that "Chadha['s] hard-earned degrees would not be able to be professionally utilized or recognized relative to the varying standards of foreign educational/professional licensing systems" (J.A. 37).

The INS officer concluded: "I'm unable to find on the basis of the evidence submitted that Mr. Chadha would suffer the extreme hardship required by the statute. Accordingly, I am going to deny his application for suspension of deportation" (J.A. 30). He then adjourned the hearing, only to resume it to announce, without explanation, that "on further thought I think I might be inclined to grant this application for suspension of deportation" (J.A. 31). In a written decision on June 25, 1974, the special inquiry officer concluded: "The re-

[4] Concurrent resolutions of the Congress are agreed to by both Houses but are not presented to the President; in contrast, joint resolutions are presented to the President for approval.

[5] In support, he submitted letters from Kenyan and British consular officials (J.A. 43-45). Under the United Kingdom's Immigration Act, 1971, § 3, Chadha is required to obtain leave to enter the United Kingdom. The Act is implemented by Immigration Rules which require that he obtain a special entry voucher or a work permit for a specific job. Special entry vouchers are issued at the discretion of the British government: "An annual quota of special vouchers has been available since 1968, mainly in East Africa to heads of households and their families who were under pressure and had nowhere to go. The annual quota was set initially at 1,500; revised to 3,000 in mid-1971; to 3,500 in 1972 and to 5,000 in 1975." Gt. Britain, Home Office, *Control of Immigrants Statistics, United Kingdom, 1980*, 28 Cmnd. No. 8199 (1981).

spondent has established that it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation. . . . Because of his race and the difficulties he would face by reason thereof, I am satisfied that his deportation would result in an extreme hardship to him" (J.S. 66a).*

The suspension was reported to Congress for consideration under section 244(c)(2). On December 16, 1975, the House agreed to House Resolution 926, 94th Cong., 1st Sess., "That the House of Representatives does not approve the granting of permanent residence in the United States to the [six] aliens hereinafter named . . .," including Chadha (J.S. 69a). The chairman of the Immigration Subcommittee stated: "It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet these statutory requirements, particularly as it relates to hardship" (J.S. 68a).

The deportation proceeding was reopened on August 4, 1976. Chadha's counsel moved to terminate it on the ground that section 244(c)(2) is unconstitutional. The special inquiry officer declined to rule on the constitutionality of section 244 (c)(2), adding, "the whole suspension procedure is a package deal and if the Congressional review aspect is found unconstitutional it would follow that the whole section would become inoperative" (J.A. 50). After Chadha declined to designate a country of deportability, the INS officer "propose[d] to order that he be deported to the United Kingdom of which he is a citizen. If you think that he will be persecuted in that country you can either apply for asylum . . . or . . . the withholding of deportation under Section 243(h)" (J.A. 51). Chadha did not apply, and a final order of deportation to the United Kingdom was entered on November 8, 1976 (J.S. 70a–71a). The Board of Immigration Appeals dismissed his appeal on February 11, 1977 (J.S. 72a–73a).

* The INS officer noted that Chadha "stated that his deportation would result in a hardship to him because he has formed strong personal ties with friends and because it is questionable whether he would be able to utilize his education in other countries" (J.S. 66a), but he made no finding with respect to these assertions.

On March 24, 1977, Chadha petitioned the court of appeals to review the order of deportation. The INS informed the court that it agreed that section 244(c)(2) is unconstitutional and suggested that the Senate and House be invited to file briefs amicus curiae, which they did. On November 28, 1980, Chadha's counsel notified the court that Chadha had married a United States citizen on August 10, 1980. Even though Chadha was now eligible for permanent residence as the spouse of a citizen, his counsel asked the court to decide the constitutionality of section 244(c)(2). The Senate and the House asked for time to brief the effect of Chadha's marriage, but the court rendered its decision on December 22, 1980, without having heard from them or from the INS on Chadha's changed status.

The court held that it had jurisdiction under section 106(a) of the INA (J.S. 4a–11a), and that Chadha's claim was justiciable. First, it held that section 244(c)(2) is severable from the remainder of section 244 and that "if section 244(c)(2) is invalidated, the original suspension under section 244(a) will be reinstated and Chadha's status adjustment will become permanent" (J.S. 18a–19a). Second, it held that Chadha's claim was not a political question because "the source of [the] claimant's appeal is not textually committed to another branch" (J.S. 22a). Third, the court found sufficient adverseness for jurisdiction, noting the appearance of the Senate and House as amici at the court's invitation (J.S. 23a).

On the merits, the court held that section 244(c)(2) "violates the rule of separation of powers by usurping a necessary power of another branch" (J.S. 26a), and ordered that the deportation proceedings be canceled (Sen. Pet. 84a). Pursuant to S. Res. 40 and H.R. Res. 49, 97th Cong., 1st Sess. (1981), the Senate and House moved to intervene and petitioned for rehearing. The court granted the motions to intervene on March 10, 1981, and denied the petition for rehearing on March 25, 1981.

SUMMARY OF ARGUMENT

I

The history of section 244 demonstrates that Congress intended legislative review to be indispensable to the grant of

permanent residence to deportable aliens. Almost fifty years ago, the executive first requested legislation to authorize it to waive deportation laws on hardship grounds, but Congress viewed the grant to the executive of final discretionary authority as an abdication of its role in controlling immigration. Congress and the executive broke their deadlock in 1940 by adopting a cooperative procedure patterned after the resolution, the previous year, of a similar impasse over executive reorganization. The statutory compromise, which President Roosevelt approved without objection, authorized the executive to suspend deportation and to report to Congress, which could then disapprove the recommended grant of permanent residence by concurrent resolution. When President Kennedy signed into law the current version of section 244, he became the fourth president to approve legislation providing for congressional review of relief from deportation.

II

Fundamental principles of judicial restraint required the court of appeals to remand the case to the INS to consider the availability of statutory relief. While the case was under submission, Chadha became eligible for permanent residence when he married a United States citizen. Also, Congress enacted the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102, which prohibits the deportation of an alien to a country in which he would face persecution. Despite the availability of alternative statutory relief, the court unnecessarily adjudicated a constitutional question with grave implications for the allocation of power between the political branches.

III

The court of appeals lacked jurisdiction to adjudicate the constitutionality of section 244. Section 106(a) of the INA provides for review in the courts of appeals of final orders of deportation entered "pursuant to administrative proceedings under section 242(b) of this Act." The court of appeals extended section 106(a) to encompass a constitutional challenge to congressional action external to the administrative deporta-

86-464 O - 81 - 3

tion proceeding. However, this Court has ruled that the jurisdiction of the courts of appeals under section 106(a) is limited "to orders entered during proceedings conducted under § 242 (b), or directly challenging deportation orders themselves." *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 215 (1968). The decision of the court of appeals is now in conflict with the Third Circuit, which has since held that "a faithful application of *Cheng Fan Kwok*" requires that constitutional challenges to statutes and regulations underlying deportation orders begin in the district courts. *Dastmalchi* v. *INS*, No. 80–2432, slip op. at 17 (3d Cir. Sept. 17, 1981).

IV

The basic rules of constitutional litigation require that the Court consider the statutory question of severability first. *McCorkle* v. *United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). The language and history of section 244 demonstrate that the Congress firmly conditioned its limited delegation of power to the executive upon retention by the Congress of the sole authority to cancel deportations and grant permanent residence. Section 244 specifically provides that cancellation of deportation and the grant of permanent residence to a deportable alien depend upon favorable congressional review. If section 244(c)(2) were invalidated, there would be no statutory authority to cancel Chadha's deportation or grant him permanent residence. This is confirmed by the legislative history of section 244, which is marked by the repeated rejection of requests by the executive for authority to cancel deportations. The invalidation of the procedure for congressional review would require the abrogation of the suspension procedure as a whole. Consequently, there is no judicial relief which may be granted to Chadha and he lacks standing.

V

Section 244 satisfies the separation of powers test of *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). It augments, and in no way infringes upon, executive power. Congres-

sional disapproval of the grant of permanent residence does not undermine the exercise of executive discretion to suspend deportation temporarily. Rather, it constitutes an exercise of the retained power of the Congress to cancel deportations and grant permanent residence. *Asimakopoulos* v. *INS*, 445 F.2d 1362, 1364–65 (9th Cir. 1971).

Nor does section 244 infringe on judicial power. Under the INA the courts do not review whether an alien should have been granted permanent residence, but only whether the Attorney General improperly denied the alien the opportunity to have Congress consider granting permanent residence. Congressional review of the executive's recommendation to cancel deportation in no way interferes with judicial review of the executive's refusal to suspend deportation and report to Congress.

Section 244 is justified by the need to promote the power of Congress over the admission of aliens. Congress has established in great detail categories to govern the treatment of aliens. It has also determined that there should be a procedure to suspend the mechanical operation of the deportation rules in unforeseeable circumstances. In cooperation with the executive the Congress has designed a flexible mechanism to allow the executive to initiate recommendations for relief and to preserve the final authority of the Congress to grant permanent residence. The arrangement has allowed the political branches to work harmoniously for forty years to grant permanent residence to thousands of deportable aliens.

ARGUMENT

I

THE HISTORY OF SECTION 244 DEMONSTRATES THAT CONGRESS INTENDED TO PRESERVE ITS AUTHORITY OVER THE GRANT OF PERMANENT RESIDENCE TO DEPORTABLE ALIENS

Section 244's legislative history spans the years from 1934 to 1962. During this time, the Congress repeatedly rejected the executive's request for authority to cancel deportations and insisted that legislative review be an indispensable requirement

for granting permanent residence to deportable aliens. As an accommodation between the branches, four successive presidents agreed without constitutional objection to arrangements which paralleled statutes for legislative review of executive reorgnizations, whose constitutionality the executive has repeatedly affirmed. Because the origins of section 244 are central to the entire case, we begin by setting forth the section's history in some detail.

1. THE ADMINISTRATION OF PRESIDENT ROOSEVELT

The Immigration Act of 1924, Pub. L. No. 139, § 14, 43 Stat. 153, 162, required the Secretary of Labor to deport any alien who entered or remained in the United States unlawfully. In 1933, Secretary Perkins temporarily suspended numerous deportations on grounds of hardship, 78 Cong. Rec. 11783 (1934), and requested that the 73d Congress adopt legislation to allow deportable aliens to remain in the United States. H.R. 9725, 73d Cong., 2d Sess. (1934). The Labor Department bill was opposed as "grant[ing] too much discretionary authority," 78 Cong. Rec. 11790 (remarks of Rep. Dirksen), and it failed decisively. *Id.*, 11791.

In the 74th Congress, the administration supported bills to authorize an Inter-Departmental Committee to grant permanent residence to deportable aliens who had lived in the United States for ten years or who had close relatives here. S. 2969 and H.R. 8163, 74th Cong., 1st Sess. (1935).[7] The bills were attacked as an "abandonment of congressional control over the deportation of undesirable aliens," H.R. Rep. No. 1110 (Part 2), 74th Cong., 1st Sess. 2 (1935), and after prolonged debate the Congress adjourned without taking action.[8]

[7] "While any police court judge or magistrate who has authority to sentence a criminal . . . may, in his uncontrolled discretion, prevent the deportation of that criminal . . . *there is no power in the United States, not even that of the President, to avert the deportation of an alien who is not a criminal.*" H.R. Rep. No. 1110, 74th Cong., 1st Sess. 6 (1935) (emphasis in original).

[8] The House requested the Secretary of Labor to extend deportation stays until March 1, 1936, to give the Congress time to consider legislation.

In the 75th Congress, Representative Dies introduced H.R. 6391 to authorize the Secretary to grant permanent residence to up to 8,000 deportable aliens. He described this as "a compromise of the deportation question, which has been pending in the House for many years." 81 Cong. Rec. 4652 (1937). The bill passed the House, *id.*, 5574, but did not come to a vote in the Senate. 83 Cong. Rec. 8992–96 (1938).

A legislative solution was not found until the 76th Congress and the executive agreed to procedures for congressional review. First, the House agreed to an amendment to H.R. 5138 to grant authority to the Department of Labor to suspend deportations which would cause serious economic detriment to the dependent citizen or legally resident wife, parent, or child of a deportable alien. Suspensions for longer than six months would be reported to Congress "with appropriate recommendations and the reasons for clemency." Permanent residence could be granted only "if by act or resolution the Congress shall direct the deportation warrant to be canceled. . . ." 84 Cong. Rec. 10455 (1939).

Secretary Perkins told the Senate that "it does not appear [the House bill] . . . will accomplish anything tangible," and renewed her support for the Dies bill which had failed in the 75th Congress.[9] In response, the Senate Judiciary Committee reported an amended bill. While the House bill had required congressional action to cancel specific deportations, the Senate amendment required that deportations should be canceled un-

---

H.R. Res. 350, 74th Cong., 1st Sess. (1935). In response, Secretary Perkins acknowledged: "Temporary stays are legal beyond question. Stays . . . which are in effect permanent are, despite the humane arguments in their favor, illegal." H.R. Doc. No. 392, 74th Cong., 2d Sess. 6 (1936).

[9] The Secretary said of the House bill: "It really adds nothing to powers not already possessed by the Department or by the Congress. Congress has always had the right to relieve an alien of deportation by passing a private bill. The Department has always had authority to bring meritorious cases to the attention of the Congress, and it has always been the administrative practice, when a private bill is pending, not to effect deportation." *Crime to Promote Overthrow of Government: Hearing on H.R. 5138 Before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 3d Sess. 29 (1940) (letter from Secretary Perkins to Senator Danaher).

less "the Congress shall by Act or resolution reject the recommendation of the Secretary. . . ." [10]

On May 22, 1940, the President invoked the legislative review mechanism of the Reorganization Act of 1939 to propose the transfer of the INS from the Department of Labor to the Department of Justice.[11] The 1939 Act, adopted with the President's approval after extensive discussion of its constitutionality, provided that executive reorganization proposals would become effective unless disapproved by concurrent resolution of the Congress.[12] Then, on June 10, 1940, the Senate committee reported, and the Senate shortly thereafter passed, a second substitute deportation bill whose procedures paralleled those of the 1939 Reorganization Act. Under this compromise between the House bill and the executive's original proposals, the Attorney General could suspend the deportation of qualified indi-

[10] H.R. 5138, § 10, as reported with amendments by S. Rep. No. 1721, 76th Cong., 3d Sess. 2 (1940).

[11] Congress approved the President's reorganization proposal and accelerated its effective date by a joint resolution on June 4, 1940. H.R.J. Res. 551, 54 Stat. 230.

[12] In March, 1939, the House Select Committee on Government Organization had reported H.R. 4425 to authorize the President to transmit reorganization plans, which would take effect in sixty days unless the Congress disapproved by concurrent resolution. The Committee stated:

"That the taking effect of action legislative in character may be made dependent upon conditions or contingencies is well recognized. The latest pronouncement of the Supreme Court on the subject is in *Currin et al.* v. *Wallace et al.*, . . . decided January 30, 1939. . . . *It seems difficult to believe that the effectiveness of action legislative in character may be conditioned upon a vote of farmers but may not be conditioned on a vote of the two legislative bodies of the Congress.*" H.R. Rep. No. 120, 76th Cong., 1st Sess. 6 (1939) (emphasis added).

The House passed the bill after closely considering its constitutionality. *E.g.*, 84 Cong. Rec. 2477–79 (1939). Senator Wheeler proposed that reorganization plans be approved by joint resolutions of the Congress. *Id.*, 2957. Senator Barkley responded that congressional review is "a condition precedent which, in my judgment, is just as valid as the affirmative condition which is urged here by the Wheeler amendment," *id.*, 3036, and Senator Wheeler's amendment was defeated. *Id.*, 3093. Although a year earlier, President Roosevelt had objected to congressional review of executive reorganization orders, 83 Cong. Rec. 4487 (1938), he approved the Reorganization Act of 1939, Pub. L. No. 19, 53 Stat. 561.

viduals and report to the Congress. The deportation would be canceled and permanent residence granted if Congress did not adopt a concurrent resolution of disapproval. S. Rep. No. 1796, 76th Cong., 3d Sess. 5–6 (1940). The executive played a major role in fashioning this compromise.[13]

Representative Celler told the House that the Senate compromise "makes the act humane and reasonable," 86 Cong. Rec. 9035 (1940), and the House agreed to the amended bill. Without objection, President Roosevelt approved the Alien Registration Act of 1940, Pub. L. No. 670, 54 Stat. 670, becoming the first of four presidents to approve the use of congressional review to grant permanent residence to deportable aliens.

2. THE ADMINISTRATION OF PRESIDENT TRUMAN

In 1947, the Department of Justice requested legislation to authorize the Attorney General to cancel deportations without congressional review. H.R. 2933, 80th Cong., 1st Sess. (1947). The administration did not question the constitutionality of congressional review, but sought merely "to save time and energy of everyone concerned. . . ." [14] The Senate Judiciary Committee insisted, however, "that affirmative action by the Congress in all suspension cases should be required before deportation proceedings may be canceled.' [15] Congress rejected

[13] *See* Mansfield, *The Legislative Veto and the Deportation of Aliens*, 1 Pub. Ad. Rev. 281, 283 (1941) ("The Senate Judiciary Committee . . . substituted a Labor Department draft. . . ."). Speaking generally of the bill, which became the Alien Registration Act of 1940, Senator Connally informed the Senate: "We called on the Department of Justice, and had the Solicitor General with us. We called in the Commissioner of Immigration and Naturalization, and together we went over all the existing laws, and worked the new provisions into the existing laws, so as to make a harmonious whole." 86 Cong. Rec. 8345 (1940).

[14] *Regulating Powers of Attorney General to Suspend Deportation of Aliens: Hearings Before the Subcommittee on Immigration of the House Committee on the Judiciary on H.R. 245, H.R. 674, H.R. 1115, and H.R. 2933*, 80th Cong., 1st Sess. 34 (1947).

[15] S. Rep. No. 1204, 80th Cong., 2d Sess. 4 (1948). The House Judiciary Committee reported that it "gave careful consideration to H.R. 2933, which represented the views of the Department of Justice, but . . . decided that the best interests of the country would be served by limiting the proposed extended powers. . . ." H.R. Rep. No. 647, 80th Cong., 1st Sess. 2 (1947).

the Department's request for final authority and amended the Immigration Act to require that cancellation of deportation be approved by a concurrent resolution of the Congress; President Truman signed the bill without objection. Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206. The following year, when Congress renewed the Reorganization Act of 1939, the Justice Department defended the constitutionality of legislative review of executive reorganization plans, citing as support the legislative review mechanism for cancellation of deportations.[16]

Early in the following Congress, the House Judiciary Committee reconsidered the 1948 Act. Concluding that the requirement of affirmative approval was unworkable, the committee reported H.R. 3875 to require the Attorney General to cancel deportations if neither House disapproved his recommendations. H.R. Rep. No. 362, 81st Cong., 1st Sess. (1949). The House passed the bill, 95 Cong. Rec. 3822 (1949), but the Senate took no action. Instead, the Senate Judiciary Committee, in a comprehensive report preparatory to the Immigration and Nationality Act of 1952, recommended a compromise between the existing law and the House bill. For certain classes of aliens, the committee suggested that the adjustment of status be subject to disapproval of either House; [17] but deportation of an alien "who is of the criminal, subversive or immoral classes *or who overstays his period of admission,*" would be canceled only upon a concurrent resolution of approval. S. Rep. No. 1515, 81st Cong., 2d Sess. 610 (1950) (emphasis added). In the 82d Congress, the Senate and the House approved provisions for

---

[16] *See* Department of Justice, *Memorandum re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress* (S. 526 and H.R. 2361, 81st Cong., 1st Sess.), *reprinted in* S. Rep. No. 232, 81st Cong., 1st Sess. 19–20 (1949).

[17] A year earlier, in its report on executive reorganization, the Senate Judiciary Committee explained why either House should be empowered to disapprove executive proposals: "The power thus reserved to each House seems essentially the same as that possessed by each House in the ordinary legislative process, in which process no new law or change in existing law can be made if either House does not favor it." S. Rep. No. 232, *supra* note 16, at 15.

congressional review generally consistent with the 1950 Senate committee report.[18]

Section 244 was enacted when the Congress overrode President Truman's veto. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 214 (1952). As part of a detailed veto message, the President specifically considered the provision for suspension of deportation and objected only to the restrictiveness of its eligibility standards, not to the provisions for legislative review.[19]

3. THE ADMINISTRATION OF PRESIDENT EISENHOWER

In 1956 and 1957, President Eisenhower expressed concern over the increasing number of private immigration bills and requested that the Attorney General be given final authority to grant discretionary relief for specified categories of aliens,

---

[18] The Senate Judiciary Committee explained why it classified, for purposes of congressional review, aliens who overstay visas with aliens deportable for criminal reasons. The committee objected to the use of nonimmigrant visas by persons who intended subsequently to seek an adjustment of status. "This practice is grossly unfair to aliens who await their turn on the quota waiting lists. . . ." S. Rep. No. 1137, 82d Cong., 2d Sess. 25 (1952).

[19] The Deputy Attorney General and the Acting Commissioner of the INS had submitted their views on the legislation, and neither had objected to congressional review. *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 716, H.R. 2379, and H.R. 2816*, 82d Cong., 1st Sess. 280–88, 711–22 (1951). In vetoing the INA, President Truman objected that a requirement that cabinet officers transmit documents to a Joint Congressional Committee was "not consistent with the constitutional doctrine of the separation of powers," while he voiced no such objection to congressional review under section 244. H.R. Doc. No. 520, 82d Cong., 2d Sess. 7 (1952). Earlier, President Truman had signed the Displaced Persons Act of 1948, Pub. L. No. 774, § 4, 62 Stat. 1009, 1011, which authorized the Attorney General to recommend and the Congress by concurrent resolution to approve permanent residence for 15,000 displaced persons already residing in the United States. The President questioned "the cumbersome practice of special action by the Congress to adjust the status of individual aliens," Pub. Papers 384 (1948), but did not contend that legislative review was beyond the power of Congress. In contrast, President Truman explicitly objected to review by *committees* of the Congress, *e.g.*, 98 Cong. Rec. 9756 (1952) (veto of bill requiring House and Senate committee approval of postal facility leases).

86-464 O - 81 - 4

H.R. Doc. No. 329, 84th Cong., 2d Sess. 3–4 (1956); H.R. Doc. No. 85, 85th Cong., 1st Sess. 4 (1957).[20] There is no indication that President Eisenhower's proposal was motivated by constitutional doubt about section 244.[21] Congress agreed to grant discretion to the Attorney General to *admit* some excludable aliens on hardship grounds, Act of September 11, 1957, Pub. L. No. 85–316, § 5, 71 Stat. 639, 640, but again refused to delegate to the executive final authority to grant relief from deportation.[22]

4. THE ADMINISTRATION OF PRESIDENT KENNEDY

In 1962, President Kennedy, who was the fifth president to approve congressional review of reorganization proposals,[23] also

---

[20] Bills to implement the President's proposals provided that the Attorney General be authorized "to withhold the institution of deportation proceedings, to cancel an order of deportation and to adjust the status" for aliens in three categories: veterans, relatives of citizens or permanent residents, and clergymen. S. 3167, § 2, 84th Cong., 2d Sess. (1956); S. 343, § 2, and S. 1006, § 8, 85th Cong., 1st Sess. (1957).

[21] In 1957, President Eisenhower requested extension of "the practical arrangements contained in the Reorganization Act by which the Congress and the President can carry forward their cooperative endeavors to provide the best possible management of the public business." Pub. Papers 232 (1957). He also approved the Refugee Relief Act of 1953, Pub. L. No. 203, § 6, 67 Stat. 400, 403, to grant permanent residence to Eastern European refugees by concurrent resolution. Like President Truman, President Eisenhower disputed the constitutionality of review by congressional *committees*, *e.g.*, 102 Cong. Rec. 12958 (1956) (veto of bill requiring committee approval of certain defense expenditures).

[22] *See* 103 Cong. Rec. 1509 (1957) (remarks of Rep. Walter). Section 13 of the 1957 Act, 8 U.S.C. 1255b, grants discretion to the Attorney General to record the permanent residence of no more than fifty diplomatic refugees annually. The statute requires the Attorney General to report to the Congress the reasons for the adjustment of status, which becomes final if neither House disapproves. President Eisenhower signed the act without objecting to this provision. Pub. Papers 672 (1957).

[23] President Hoover was the first president to endorse congressional review of executive reorganization. Pub. Papers 432 (1929). In 1961, President Kennedy credited the reorganization act as "a long accepted and useful procedure. . . ." Pub. Papers 251 (1961). Like his predecessors, he opposed committee review of executive actions, Pub. Papers 6 (1963), but he also proposed legislation to authorize either House to reject agricultural production and marketing plans. Pub. Papers 196 (1961).

became the fourth president to approve congressional review of the grant of permanent residence to deportable aliens when he signed legislation amending section 244.[24] The Senate passed S. 3361 to amend section 249 of the INA to authorize the Attorney General to record the permanent residence of aliens who had entered the United States before December, 1952, rather than before June, 1940, as the INA then provided. Representative Walter moved successfully in the House to eliminate this portion of the Senate bill, arguing "[i]f there are meritorious cases, then we feel we can deal with them adequately through existing suspension of deportation laws or through private legislation." 108 Cong. Rec. 22607 (1962). The conferees compromised by broadening eligibility under section 244, thereby facilitating residence for deportable aliens in Chadha's class,[25] while adhering to the legislative decision that "the granting of relief will be subject to congressional review . . . ." H.R. Rep. No. 2552, 87th Cong., 2d Sess. 4 (1962).

II

FUNDAMENTAL RULES OF JUDICIAL RESTRAINT REQUIRE A REMAND TO CONSIDER THE AVAILABILITY OF STATUTORY RELIEF

Section 244 is one of a number of statutes which use procedures for legislative review to accommodate the powers and responsibilities of the elected branches. These statutes span issues as diverse as the withdrawal of armed forces from overseas hostilities, the foreign sale of defense material, the deferral of federal spending, and the allocation of food aid among needy countries.[26] Considering the importance of legislative review in

---

[24] Act of October 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247.

[25] Permanent residence for aliens who overstay their nonimmigrant visas, as Chadha did, no longer requires approval by a concurrent resolution; the 1962 amendment allows cancellation of deportation if neither House objects.

[26] War Powers Resolution, § 5, 50 U.S.C. 1544(c); International Security Assistance and Arms Export Control Act of 1976, § 211, 22 U.S.C. 2776(b); Congressional Budget and Impoundment Control Act of 1974, § 1013, 31 U.S.C. 1403; International Development and Food Assistance Act of 1975, § 310, 22 U.S.C. 2151n. *See* Addendum 1 to this brief, *infra*, for a list of current provisions for legislative review and disapproval.

these and other statutes, the court of appeals should not have decided the fundamental constitutional issue presented to it, for two reasons.

First, Chadha married a United States citizen on August 10, 1980. The Attorney General has final authority under section 245 of the INA to grant permanent residence to an alien spouse of a citizen, and, "[i]n the absence of adverse factors, adjustment will ordinarily be granted." [27] The court of appeals reached the merits after Chadha's counsel stated that Chadha had no "present intention" of seeking an adjustment of status,[28] but a party's desire to challenge the constitutionality of a statute does not control when a nonconstitutional resolution is available. *Rosenberg* v. *Fleuti*, 374 U.S. 449, 451 (1963).

Second, there has been a major change in the law. Chadha presented himself to the INS as a potentially stateless person who feared persecution if deported to the United Kingdom or Kenya. In March, 1980, prior to the decision of the court of appeals, the Congress enacted the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102. The Act authorizes the Attorney General to grant asylum, and then permanent residence, to any alien who is unable to return to his country of nationality because of "a well-founded fear of persecution on account of race," [29] and it prohibits the Attorney General from deporting an alien to a country in which his "life or freedom would be threatened . . . on account of race. . . ." [30] Thus, if Chadha's fear of racial persecution is well-founded, the Attorney Gen-

---

[27] *Matter of Arai*, 13 I. & N. Dec. 494, 496 (1970), *quoted in Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). The INS officer told Chadha that "if you got married you would have no difficulty in having your status adjusted" (J.A. 29).

[28] Memorandum with Respect to Current Status of Petitioner Jagdish Rai Chadha filed November 28, 1980.

[29] Refugee Act, § 201, adding INA, §§ 101(a)(42), 208, 209(b), 8 U.S.C.A. 1101(a)(42), 1158, 1159(b) (Supp. 1981).

[30] Refugee Act, § 203(e), amending INA, § 243(h), 8 U.S.C.A. 1253(h)(1) (Supp. 1981). "The new § 243(h) removes the absolute discretion formerly vested with the Board." *McMullen* v. *INS*, 658 F.2d 1312, 1316 (9th Cir. 1981).

eral must withhold the deportation order on which the jurisdiction of the court of appeals rested.[21]

As a result, Chadha's claim "assume[s] a posture quite different from the one now presented," *Thorpe* v. *Housing Authority*, 386 U.S. 670, 673 (1967) (per curiam), and a remand to the INS is required to determine his present status. *See INS* v. *Stanisic*, 395 U.S. 62, 79 n.22 (1969). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582 (1979), *quoting Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). Now that Congress has provided firm statutory protection for refugees, the INS should determine whether the Refugee Act, rather than constitutional litigation concerning section 244, may provide relief.[22]

The court of appeals treated Chadha's marriage as a mootness question, and did not state its views on the Refugee Act of 1980, which was presented to it in the petition for rehearing. The issue is not mootness. Even for cases "confessedly within its jurisdiction," the Court has enunciated "a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). It is this sound principle of judicial

---

[21] From the inquiry officer's findings, the asylum and withholding of deportation provisions of the 1980 Refugee Act may not only offer Chadha a nonconstitutional remedy, but be the preferred avenue for relief. *Matter of Kojoory*, 12 I. & N. Dec. 215, 219–20 (1967) ("Where a respondent cannot establish the necessary hardship for suspension, we do not believe that a claim of persecution should be used to make up the deficit. The remedy available where the likelihood of persecution can be satisfactorily established is a stay of deportation under section 243(h)").

[22] Congress had already provided for Chadha's other problem, obtaining admission to the United Kingdom. Under section 243(a) of the INA, 8 U.S.C. 1253(a), the Attorney General may deport an alien only to a "country [which] is willing to accept him into its territory." If any country unduly delays acceptance of a national, the Secretary of State, upon notification by the Attorney General, shall "discontinue the issuance of immigrant visas to nationals . . . of such country, until such . . . country has accepted such alien." INA, § 243(g), 8 U.S.C. 1253(g).

restraint which required the court of appeals to avoid the adjudication of the major constitutional issue in this case. *See Clark* v. *Valeo*, 559 F.2d 642, 663 (D.C. Cir.) (en banc) (Leventhal, J., concurring) (distinguishing prudential concerns from mootness as ground to dismiss challenge to legislative review provision), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977).

The court justified its refusal to avoid the constitutional question on the ground that statutory relief would not act retroactively. In fact Chadha would receive a properly equivalent remedy if his status were adjusted as the spouse of a citizen or as a refugee. The jurisdiction of the court of appeals was invoked to review an order of deportation. Its judgment was limited to the validity of the deportation order (Sen. Pet. 84a). By reason of his marriage or through asylum Chadha can obtain relief identical to that judgment, cancellation of the deportation proceeding. In a footnote, but not in its judgment, the court asserted that permanent residence for Chadha, granted through this constitutional adjudication, should be dated retroactively to the temporary suspension of deportation in 1974 (J.S. 18a n.6). However, section 244 is explicit that cancellation follows congressional review, and that permanent residence dates from the cancellation of deportation.[33]

Since 1940, the political branches have cooperated through section 244 to grant permanent residence to thousands of deportable aliens.[34] Until this case, the executive had not ques-

---

[33] The Congress specifically considered the date on which an alien should become a permanent resident if his deportation is canceled. The Alien Registration Act of 1940 provided that "[u]pon the cancelation of such proceedings . . . the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States. . . ." Pub. L. No. 670, § 20, 54 Stat. 670, 672. The provision for retroactive grant of permanent residence was eliminated in the INA, Pub. L. No. 414, § 244(d), 66 Stat. 216–17.

[34] Between 1940 and 1948, over 19,000 deportable aliens were adjusted to permanent residence under the forerunner to section 244. No disapproval mechanism existed between 1948 and 1952. Since 1953, more than 5,700 aliens have been granted permanent residence through section 244(c)(2). Over the last forty years, Congress has disapproved cancellation of deportation of 229 aliens. *See* Addendum 2 to this brief, *infra*, for a compilation of congressional actions under section 244.

tioned the provision's constitutionality. Before the Court is asked to resolve the grave constitutional question in this case, the respondents should pursue alternative relief which is available under the INA. If, in the future, Chadha or someone else lacks an alternative remedy, resolution of the constitutional question may be necessary. Until then, the fundamental rules of restraint which this Court honors preclude adjudication of the constitutional issue in this case.[35]

III

THE COURT OF APPEALS LACKED JURISDICTION UNDER SECTION 106(a)

Section 106(a) of the INA limits the jurisdiction of the courts of appeals to the review of final orders of deportation "pursuant to administrative proceedings under section 242(b) of the Act. . . ." Even though congressional review takes place outside of the administrative proceedings conducted under section 242(b), the court of appeals concluded that it had jurisdiction under 106(a). This important threshold ruling of the court of appeals has since been specifically rejected by the Third Circuit, which concluded that "unlike the court in *Chadha*, we cannot read section 106(a) to encompass attacks on the constitutionality of a statute or a regulation underlying an alien's deportation order." *Dastmalchi* v. *INS*, No. 80–2432, slip op. at 22 (3d Cir. Sept. 17, 1981). Chadha should have commenced his action in the district court.

"[A] jurisdictional statute of this kind should be circumspectly construed. . . ." *Foti* v. *INS*, 375 U.S. 217, 232 (1963) (Harlan, J., concurring). Section 106(a) grants to the courts of appeals the power to review discretionary determinations by INS officials with responsibility for the conduct of depor-

---

[35] "[T]he constitutional validity of a congressional disapproval device 'represents the continuation of a dispute of major constitutional proportions which has been brewing for forty years.' No good reason appears why, in the circumstances of this case, this court should now strain to exercise its jurisdiction to resolve this momentous political as well as legal problem." *Clark* v. *Valeo*, *supra*, 559 F.2d at 649–50 (per curiam) (footnote omitted) (quoting Department of Justice memorandum).

tation proceedings.[36] The Court drew the line in *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968), ruling that the denial of a stay of deportation by an INS district director, who has no responsibility for section 242(b) deportation proceedings, was not covered by section 106(a). The Court held that "§ 106(a) embrace[s] only those determinations made during a proceeding conducted under § 242(b), including those determinations made incident to a motion to reopen such proceedings." *Id.* at 216.

The court of appeals extended this jurisdictional line to reach "all matters on which the validity of the final order [of deportation] is contingent, rather than only those determinations actually made at the hearing" (J.S. 5a). But this Court has already rejected the theory of the INS "that § 106(a) should be understood to embrace all determinations 'directly affecting the execution of the basic deportation order,' whether those determinations have been reached prior to, during, or subsequent to the deportation proceeding." *Cheng Fan Kwok* v. *INS*, *supra*, 392 U.S. at 210. As the Third Circuit recognized, a "faithful application of *Cheng Fan Kwok*" means that judicial review under section 106(a) does not extend to the constitutionality of section 244(c)(2), because that issue could not have been tested during the administrative deportation proceedings. *Dastmalchi* v. *INS*, *supra*, slip op. at 17.[37]

The Attorney General's grant of a temporary suspension ends his discretion under section 244 and delimits the court's jurisdiction under section 106(a). This demarcation is more than formal. It reflects the consistent judgment of the Congress over the forty-year history of section 244 that the role of the Attorney General is limited to determining which cases should be reported to Congress and to suspending those deportations temporarily to allow the Congress to consider his recommendations. It also reflects the nature of judicial review of a deportation proceeding, which, pursuant to section 106

[36] *Foti* v. *INS*, *supra* (review of denial by INS special inquiry officer of application for suspension during a section 242(b) deportation proceeding); *Giova* v. *Rosenberg*, 379 U.S. 18 (1964) (per curiam) (refusal by Board of Immigration Appeals to reopen a section 242(b) deportation proceeding).

[37] *See Rassano* v. *INS*, 377 F.2d 971, 974 (7th Cir. 1967) (alien may not collaterally attack prior conviction during deportation hearing).

(a)(4), "shall be determined solely upon the administrative record upon which the deportation order is based. . . ." The parties in an INS proceeding naturally develop a record geared to the determinations which are within the power of the INS to make. Not surprisingly, there is nothing in the administrative record in this case which sheds any light on the theoretical assessment of the court of appeals that congressional review disrupts the implementation of section 244. "Review of various legislative review mechanisms ought at an absolute minimum to be informed by experience and not depend solely on abstract analysis or speculation. A court should know a great deal more about what a unicameral disapproval device means in practice. . . ." *Clark* v. *Valeo, supra,* 559 F.2d at 650 n.10.

"[T]he basic purpose of § 106(a) was to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts. . . ." *Foti* v. *INS, supra,* 375 U.S. at 226. There is no danger that proceeding in the district court rather than the court of appeals will proliferate the opportunities for judicial review. The four-year proceeding in the court of appeals cannot be justified by the need to expedite immigration cases. This case does not involve review of repetitive determinations which may figure in many immigration cases. Rather, it is a singular controversy which may be litigated in the district court without affecting the jurisdiction of the courts of appeals over matters which arise with great frequency in section 242(b) deportation proceedings. *See Cheng Fan Kwok* v. *INS, supra,* 392 U.S. at 217 ("[O]n occasion, the review of denials of discretionary relief will be conducted separately from the review of an order of deportation involving the same alien. Nonetheless, this does not seem an onerous burden. . . .")[38]

[38] On those occasions when Congress intended there to be an initial ruling by the courts of appeals on the constitutionality of legislative review mechanisms, it has enacted special provisions by which challenges commence in the district courts and are certified to the courts of appeals to hear en banc. Federal Trade Commission Improvements Act of 1980, § 21(f), 15 U.S.C.A. § 57a-1(f) (Supp. 1981); Act of December 17, 1980, Pub. L. No. 96-539, § 4, 94 Stat. 3196 (extension of Federal Insecticide, Fungicide, and Rodenticide Act) (to be codified in 7 U.S.C. 136w).

IV

BECAUSE SECTION 244(C)(2) IS INSEVERABLE THERE IS NO RELIEF WHICH MAY BE PROVIDED

If the delegation of limited authority to the Attorney General is inseverable from the provision for legislative review, the court of appeals lacked statutory authority to order cancellation of Chadha's deportation. For this reason, "The canons of constitutional litigation dictate that we initially consider the statutory issue of separability before we turn to the question of constitutionality." *McCorkle* v. *United States*, 559 F.2d 1258, 1261 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). With respect to severability, the question pertains "to the *intent* of Congress, rather than to its *power*." *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938) (emphasis in original). The language and history of section 244 demonstrate that Congress intended legislative review to be indispensable to the grant of permanent residence to deportable aliens.

"[I]n any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself." *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). The court of appeals concluded that subsection 244(c)(2) was severable and that subsection 244(a) grants to the Attorney General complete and final power to adjust the status of deportable aliens (J.S. 15a–16a). However, subsection 244(a) does no more than to introduce the full section and to describe the categories of aliens who are eligible for relief. As its first words indicate, the limited power of the Attorney General is "[a]s hereinafter prescribed in this section. . . ." The Attorney General's authority to suspend deportation is provided, subsequently, in subsection 244(c)(1), rather than in subsection 244(a), and is only a power to defer deportation. *See McGrath* v. *Kristensen*, 340 U.S. 162, 168 (1950) (referring to antecedent of section 244). The mechanism to "cancel deportation proceedings" is contained in subsection 244(c)(2), the provision which the court invalidated, and the mechanism for recording an alien's lawful admission for permanent residence,

in subsection 244(d), operates only "[u]pon the cancellation of deportation" under subsection 244(c)(2).[39] In sum, the subsections of 244 are "so interwoven," *Electric Bond & Share Co.* v. *SEC*, *supra*, 303 U.S. at 434, that without subsection 244(c)(2) there is no authority to cancel a suspended deportation or to grant permanent residence.[40]

The history of section 244, described at pages 9–17 *supra*, confirms that Congress considered legislative review to be indispensable to the grant of permanent residence to deportable aliens. Between 1934 and 1938, three Congresses repeatedly rejected proposals to delegate to the executive branch authority to grant final relief from deportation.[41] In the 76th Congress, the House proposed initially to grant to the executive only the power to suspend deportations temporarily and to recommend to Congress legislation to cancel the deportations. The Secretary of Labor then renewed her request for authority to cancel deportations. The final bill maintained the narrow role for the executive, as proposed by the House, but changed the burden on the Attorney General and the alien from

[39] Speaking of the antecedent of 244(c)(3), this Court recognized that "deportation finally cancels only if Congress affirmatively approves the suspension. . . ." *Jay* v. *Boyd*, 351 U.S. 345, 351 (1956).

[40] The court of appeals relied on the standard severability clause, INA, § 406. This clause may well render section 244 severable from other sections of the comprehensive INA, but it hardly provides guidance whether Congress intended particular subsections of section 244 to be independent of other subsections. Moreover, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968).

[41] *Cf. New York Times Co.* v. *United States*, 403 U.S. 713, 746–47 (1971) (Marshall, J., concurring) (significance of congressional rejection of legislation to prohibit disclosure of classified information); *Afroyim* v. *Rusk*, 387 U.S. 253, 257–61, 263–66 (1967) (same for rejection of proposed expatriation authority); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 586 (1952) (same for rejection of proposed statutory authorization for plant seizures).

The sole reference by the court of appeals to the history of section 244 is to remarks of Representative Dies in 1937, three years before the 1940 Act (J.S. 15a). Representative Dies spoke in favor of a bill to give authority to the Attorney General, without legislative review, to grant permanent residence to a limited number of deportable aliens over a four-year period. 81 Cong. Rec. 5542 (1937). The bill passed only the House.

that of persuading the Congress to adopt legislation to implement a recommendation, to that of dissuading it from disapproving one. This arrangement enhanced the force of the Attorney General's recommendations, but it preserved the final authority of the Congress to decide whether permanent residence should be granted to deportable aliens.

Since 1940, the Congress has repeatedly reaffirmed that congressional review is indispensable to the grant of permanent residence to deportable aliens. Congress rejected executive requests for authority to cancel deportations in 1947, 1956, and 1957. *See* pages 13, 15–16 *supra*. It renewed its judgment about the importance of congressional review in the 1962 amendments to section 244. *See* page 17 *supra*.[42]

Now, after more than forty years of legislative consideration of section 244 and its predecessors, the executive is asking the Court to rewrite the legislation and to give to the executive the power which Congress has repeatedly refused to grant. To sever section 244(c)(2) despite this history would not only disrupt one delicate accommodation, but call into question dozens of similar ones. *See* Addendum 1 to brief, *infra*. As one commentator recently observed, often "the legislative veto has been the key to getting the very delegation of authority the executive wants." [43] In its requests to Congress for delegations of authority, the executive has known, as Attorney General

[42] Section 246 of the INA, 8 U.S.C. 1256, which governs rescission of permanent residence on the basis of new evidence, further demonstrates that congressional review is essential to the grant of permanent residence under section 244. The Attorney General has no authority to rescind permanent residence granted under section 244; that may occur only if the Congress passes a concurrent resolution withdrawing suspension of deportation. In contrast, the Attorney General may rescind the permanent residence of aliens whose status he had adjusted under section 245. The House Judiciary Committee explained: "Where adjustment was granted through congressional action, rescission would require such action, but where adjustment was obtained administratively, rescission would take effect through administrative action." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 63 (1952). The drafters of the INA plainly thought that permanent residence under section 244 was "granted through congressional action," rather than through action of the Attorney General.

[43] J. Sundquist, The Decline and Resurgence of Congress 356 (1981).

William Mitchell advised President Hoover, that provisions for congressional review would be inextricable from the delegated authority to which they are tied, and "must stand or fall together." 37 Op. Att'y Gen. 56, 66 (1933). The Fourth Circuit recognized this when it refused to separate a provision for congressional review from a government salary act, stating: "When the questioned clause restricts a power granted by the legislature, the case against severance is strong. Otherwise, the scope of the power would be enlarged beyond the legislature's intent." [44]

The inseverability of section 244 may mean that no one has standing to litigate its constitutionality, for there is no relief which can be provided.[45] This was the common sense view of the INS special inquiry officer, who asked: "If [section 244(c)(2)] is unconstitutional where would that leave the respondent? . . . It would seem to me that the whole suspension procedure is a package deal and if the congressional review aspect is found unconstitutional it would follow that the whole section would become inoperative" (J.A. 49–50). Consequently, the question of appropriate procedures for relief from deportation remains in the political process. As the Court observed in *United States* v. *Richardson*, 418 U.S. 166, 179 (1974): "In a very real sense, the absence of any particular individual or class to liti-

[44] *McCorkle* v. *United States*, *supra*, 559 F.2d at 1261. *Cf. Arnett* v. *Kennedy*, 416 U.S. 134, 153–54 (1974) (opinion of Rehnquist, J.) (declining to sever "grant of a substantive right . . . inextricably intertwined with the limitations on the procedures which are to be employed in determining that right").

[45] Because the subsections of 244 may not be severed, section 244 as a whole would be invalid if subsection 244(c)(2) is found to be unconstitutional. The unfortunate but unavoidable consequence would be that the entire statutory authority for relief from deportation would be abrogated, to the injury of the many thousands of aliens who would have benefited from it in the future. However, since there is no one who can benefit from the invalidation of the statute as a whole, there is no one with standing to challenge the statute in its entirety. Of course, the INS cannot challenge the constitutionality of the statute in the absence of an individual litigant with a stake in the outcome of the case. *See Clark* v. *Valeo*, *supra*, 559 F.2d at 654 (Tamm, J., concurring).

gate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process." [46]

V

SECTION 244(C)(2) IS CONSTITUTIONAL

On only two occasions has this Court found that an act of Congress infringed upon executive power. In both cases, the infringement violated a specific clause of the Constitution, namely, the Appointments Clause, *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Myers* v. *United States*, 272 U.S. 52 (1926).[47] Only once has this Court even considered a claim that an act of Congress infringed upon executive power without also violating a specific clause of the Constitution. *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). There, in reviewing a statute which governed control over all the papers of a President, the Court stated that "the proper inquiry focuses on the extent to which [the act] prevents the Executive Branch from accomplishing its constitutionally assigned functions," and, if it does, "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.* at 443.

Section 244 passes this test. It augments, and in no manner infringes upon, executive power. Before 1940, private legislation was the exclusive means by which the political branches could agree that the rigorous requirements of the immigration laws should be waived for individual aliens. Acknowledging

[46] Congress has continued to give attention to the question of procedures for suspension of deportation in recent years. In 1980, the Senate and House Judiciary Committees reported bills to eliminate the congressional review provisions of section 244. *See* S. Rep. No. 859, 96th Cong., 2d Sess. 15 (1980); H.R. Rep. No. 1301, 96th Cong., 2d Sess. 32 (1980). The repeal provision was deleted from the the House bill and was not voted upon in the Senate. *See* 126 Cong. Rec. H11424 (daily ed. Dec. 1, 1980) (remarks of Rep. Holtzman).

[47] The court of appeals acknowledged: "[N]o circuit or Supreme Court authority we have found holds that the Legislature has impermissibly invaded the prerogative of the Executive or the Judiciary absent a clause in the Constitution which confers the powers upon another branch with great specificity" (J.S. 25a (footnote omitted)).

that it lacked power to cancel deportations [48] and emphasizing the cumbersomeness of private bills, the executive requested an alternative mechanism to waive deportability. The supplementary procedure for canceling deportations and granting permanent residence that was eventually enacted, section 244, grants to the executive the important but limited role of suspending deportations and reporting to the Congress.

In enacting section 244, Congress delegated new authority to the executive which benefited aliens. First, the statute removes from aliens the burden of finding sponsors for private legislation by shifting to the executive the responsibility to initiate congressional consideration of relief. *See* 84 Cong. Rec. 10455 (1939) (remarks of Rep. Hobbs). Second, it requires one of the Houses of Congress, if it wishes to reject the Attorney General's recommendation, to act by resolution within a limited period of time. The nature of the Attorney General's role as recommendatory is not altered because section 244 provides for congressional action through disapproval rather than by ratification. Rather, section 244 enhances the participation of the executive by conditioning the power of the Congress to reject the Attorney General's recommendation upon its ability to pass a resolution of disapproval in one House within a limited period of time. The procedure is carefully tailored to prevent disruption to the executive branch. The restriction on congressional review through statutorily fixed time limits eliminates the potential for protracted consideration and prolonged irresolution that Jefferson viewed as "the greatest cause of evil" requiring separated powers (J.S. 32a–33a (quoting Jefferson)). Congress can hardly be accused of infringing on the authority of the executive by making the executive an important participant in the process of granting relief.

Congressional review does not undermine, as the court of appeals thought, "the weight and dignity that necessarily attends deliberative decisions by one of the highest officers in the Executive branch" (J.S. 53a). Under section 244, the Congress

[48] "Stays . . . which are in effect permanent are, despite the humane arguments in their favor, illegal." H.R. Doc. No. 392, 74th Cong., 2d Sess. 6 (1936) (report from Secretary Perkins).

does not review the decision of INS officers (to whom the Attorney General has delegated his authority) to grant a temporary suspension. Instead, the Congress exercises its own judgment whether permanent residence should be granted. As the court of appeals previously recognized: "[W]e do not construe the [House Judiciary] Committee's report [accompanying a resolution of disapproval under section 244] as an effort by the Committee to tell the Attorney General how he should exercise the discretion delegated to him by section 1254(a)(1). Rather, it is an explanation for the Committee's having exercised the discretion committed to it by section 1254(c). . . ." *Asimakopoulos* v. *INS*, 445 F.2d 1362, 1364–65 (9th Cir. 1971).

It is also significant that nothing in section 244 requires the executive to take any action, as in *Nixon* v. *Administrator of General Services, supra,* or *United States* v. *Nixon*, 418 U.S. 683 (1974). The initiating trigger of section 244 is purely discretionary; only if the Attorney General wishes to do so are deportations suspended temporarily and reports made to the Congress. If the Attorney General believes that the review mechanism in section 244 unconstitutionally infringes upon executive authority, he may refrain from submitting recommendations to the Congress for approval or rejection. President Johnson observed as he signed a bill containing a legislative review provision that "[B]y refusing to use the procedure, by noting my objections to it, and by seeking its repeal in the next session of Congress, it is possible to approve the remainder of the bill without yielding to encroachment." [49]

Nor does section 244 infringe on judicial power. The INA provides for judicial review of the refusal of the Attorney General to suspend a deportation and to transmit a recom-

[49] Pub. Papers 1083 (1965) (signing Omnibus Rivers and Harbors Act, Pub. L. No. 89–298, 79 Stat. 1073).

This Court has established the model for institutional self-defense; no branch need exercise a statutory power—*a fortiori* a purely discretionary power—if to do so would require it to submit its determinations to another branch for possible revision, in violation of the Constitution. *See Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

mendation to Congress. *See INS* v. *Wang*, 450 U.S. 139 (1981) (per curiam). However, since the Attorney General lacks the power to grant permanent residence the courts have never reviewed whether an alien should have been granted that status, but only whether the Attorney General used proper procedures and standards in denying the alien the opportunity for congressional consideration. Once the matter has proceeded to congressional review, there is no judicial review of either a grant or a denial of permanent residence. Simply put, congressional review of instances in which the executive recommends suspension in no way affects judicial review of cases in which the executive declines to recommend suspension.[50] Section 244, therefore, cannot interfere with any function of the judiciary.

Section 244 is also justified by the need to promote objectives within the constitutional powers of the Congress, the second part of the Court's standard in *Nixon* v. *Administrator of General Services, supra.* The court of appeals acknowledged that "the practicality of alternatives to legislative disapproval in other situations raises difficult questions," specifically mentioning "the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority" (J.S. 55a (footnote omitted)). The court then ventured, "We do not think [Congress] would confess itself unable to formulate deportation rules or policies applicable to individual cases that are sufficiently clear for compliance by the Executive and for ascertainment by the Judiciary" (J.S. 62a).

" 'Over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972), *quoting Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909). The Congress has legislated repeatedly and carefully in the exercise of this vast authority. It has established with precision categories to govern the admissibility, deportability, and eligibility for permanent residence of aliens. *See, e.g.*, INA,

[50] *See McGrath* v. *Kristensen, supra*, 340 U.S. at 168.

§§ 212, 241, 8 U.S.C. 1182, 1251. Congress has articulated "specific criteria" (J.S. 55a) with profuse and elaborate detail. Owing in large measure to the particularity of the immigration laws, the executive and the Congress perceived a need for a procedure to waive the mechanical operation of the rules of deportation for those few aliens who merit permanent residence in spite of, and for reasons unforeseeably deviating from, the reason for their deportability. Never in the prolonged period in which this problem has been debated has anyone suggested that the solution lay in more refined categorization.[51] In fact, President Truman's only objection to section 244 was to the restrictiveness of the eligibility standards in the 1952 Act, a condition which the Congress remedied in 1962. The Congress reasonably "promote[d] objectives within the constitutional authority of Congress," *Nixon* v. *Administrator of General Services, supra*, 433 U.S. at 443, by creating a flexible mechanism for relief, in which the Congress retains the ultimate responsibility of determining when to waive the mandatory provisions of the deportation laws.

The respondents also urged the court of appeals to find that section 244 violates the Presentation Clause and the principle of bicameralism. The court's lengthy opinion discusses bicameralism only at the end, after reiterating "that the essence of the violation here was the violation of the separation of powers rule" (J.S. 55a). We agree with the court's apparent view that the fundamental issue in this case, if the merits should be reached, is the separation of powers and not issues of legislative formalities. The approval or disapproval by the Congress or by one of its Houses under a statute providing for legislative

---

[51] In 1979, the INS proposed regulations setting forth factors to be considered in the exercise of discretion under numerous provisions of the INA, not including section 244, to ensure "fair and uniform" adjudication "under appropriate discretionary criteria." 44 Fed. Reg. 36187 (1979). The proposed rule was canceled in 1981, because "[t]here is an inherent failure in any attempt to list those factors which should be considered in the exercise of discretion. It is impossible to list or foresee all of the adverse or favorable factors which may be present in a given set of circumstances." 46 Fed. Reg. 9119 (1981).

review is not an act of lawmaking.[52] The requirements of bicameralism and presentation are fully satisfied by the enactment of the underlying statute authorizing legislative review. *See Buckley* v. *Valeo*, *supra*, 424 U.S. at 284–86 (White, J., concurring and dissenting).[53]

The Department of Justice took this precise position when it advised the Senate on the constitutionality of congressional review in reorganization legislation in 1949: "In this procedure there is no question involved of the Congress taking legislative action beyond its initial passage of the Reorganization Act." S. Rep. No. 232, 81st Cong., 1st Sess. 20 (1949) (Department of Justice memorandum). It also represents the position of the Attorney General more recently. In his opinion on the constitutionality of the legislative review provision of the most recent reorganization statute, 5 U.S.C. 906(a) (Supp. III 1979),

---

[52] The implication of respondents' Presentation Clause claim is that *all* statutes which authorize disapproval by a simple or concurrent resolution are unconstitutional, because none requires that the resolution of disapproval be submitted to the President for approval. Approaching the issue as one of separation of powers allows the Court to examine the governmental powers involved in congressional review statutes, which include such constitutionally varied matters as war powers and agency rulemaking. The responsibility of the Congress under these statutes ranges from the ascertainment of facts in unique circumstances to the consideration of general standards. The court of appeals prudently recognized that other statutes and circumstances might present "considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device" (J.S. 55a).

[53] The Presentation Clause was adopted to ensure presentation of original bills, however styled, *see* 5 J. Elliot, Debates on the Adoption of the Federal Constitution 431 (1968 ed.), not to restrict the scope of properly enacted legislation.

Over a century ago, the Attorney General recognized that Congress could pass a statute authorizing actions by one House without depriving the President of his veto power because the President could veto the authorizing statute:

"Of course, no separate resolution of either House can coerce a Head of Department, unless in some particular in which a law, duly enacted, has subjected him to the direct action of each; and in such case it is to be intended, that, by approving the law, the President has consented to the exercise of such coerciveness on the part of either House." 6 Op. Att'y Gen. 680, 683 (1854).

Attorney General Bell stated that "the statement in Article I, § 7, of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by Congress." 43 Op. Att'y Gen. No. 10, at 2 (1977). The Attorney General stated that "if the procedures provided in a given statute have no effect on the constitutional distribution of power between the legislative and the executive," then the statute is constitutional. *Id.* at 3. In the case of the reorganization statute, he concluded, the power of the President to refuse to submit a plan, combined with the power of either House of Congress to reject a submitted plan, suffices under the standard to make the statute constitutional. The Attorney General emphasized that his opinion "is limited to the narrow context of the reorganization statute," *id.* at 4, but the executive's justification of the constitutionality of the reorganization acts encompasses section 244, whose procedures and history parallel those very acts.

The Court has firmly rejected the "archaic view of the separation of powers as requiring three airtight departments of government." *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 443, *quoting Nixon* v. *Administrator of General Services*, 408 F. Supp. 321, 342 (D.D.C. 1976) (three-judge court). As Judge Leventhal stated in *Clark* v. *Valeo*, *supra*, 559 F.2d at 664 n.13, "The American Constitution accommodates hybrids that work." The Court need not, and should not, analyze this case on a hypothetical level, as the court of appeals did. Section 244 has benefited thousands of deportable aliens over the past forty years, during which the political branches have used it in harmony. It has served an entirely beneficial purpose, has injured no one, and should be sustained under "the test of 'common sense and the inherent necessities of the governmental co-ordination,'" *Atkins* v. *United States*, 556 F.2d 1028, 1071 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), *quoting*, *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928).

CONCLUSION

For the reasons stated in Part II, the judgment of the court of appeals should be vacated and the case remanded to the INS

to determine whether the constitutional question may be avoided through the grant of statutory relief. In the alternative, for the reasons stated in Parts III, IV, and V, the judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL DAVIDSON,
Senate Legal Counsel,
M. ELIZABETH CULBRETH,
Deputy Senate Legal Counsel,
CHARLES TIEFER,
MORGAN J. FRANKEL,
Assistant Senate Legal Counsels.

NOVEMBER 1981.

ADDENDA

ADDENDUM 1

STATUTES WITH PROVISIONS AUTHORIZING CONGESSIONAL REVIEW

This addendum represents an effort to identify and to describe briefly current statutory provisions for legislative review by one or both Houses of Congress. Statutory provisions for review by committees of the Congress and provisions which require legislation (i.e., passage of a joint resolution) are not included. The fifty-six statutes in the compilation (some of which contain more than one provision for legislative review) are divided into six broad categories: foreign affairs and national security, budget, international trade, energy, rulemaking and miscellaneous.

A.

FOREIGN AFFAIRS AND NATIONAL SECURITY

1. Act for International Development of 1961, Pub. L. No. 87–195, § 617, 75 Stat. 424, 444, 22 U.S.C. 2367 (Funds made available for foreign assistance under the Act may be terminated by concurrent resolution).

2. War Powers Resolution, Pub. L. No. 93–148, § 5, 87 Stat. 555, 556–557 (1973), 50 U.S.C. 1544 (Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.)

3. Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93–155, § 807, 87 Stat. 605, 615 (1973), 50 U.S.C. 1431 (National defense contracts obligating the United States for any amount in excess of $25,000,000 may be disapproved by resolution of either House).

4. Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93–365, § 709(c), 88 Stat. 399, 408 (1974), 50 U.S.C. app. 2403–1(c) (Applications for export of defense

goods, technology or techniques may be disapproved by concurrent resolution).

5. H.R.J. Res. 683, Pub. L. No. 94–110, § 1, 89 Stat. 572 (1975), 22 U.S.C. 2441 note (Assignment of civilian personnel to Sinai may be disapproved by concurrent resolution).

6. International Development and Food Assistance Act of 1975, Pub. L. No. 94–161, § 310, 89 Stat. 849, 860, 22 U.S.C. 2151n (Foreign assistance to countries not meeting human rights standards may be terminated by concurrent resolution).

7. International Security Assistance and Arms Control Act of 1976, Pub. L. No. 94–329, § 211, 90 Stat. 729, 743, 22 U.S.C. 2776(b) (President's letter of offer to sell major defense equipment may be disapproved by concurrent resolution).

8. National Emergencies Act, Pub. L. No. 94–412, § 202, 90 Stat. 1255 (1976), 50 U.S.C. 1622 (Presidentially declared national emergency may be terminated by concurrent resolution).

9. International Navigational Rules Act of 1977, Pub. L. No. 95–75, § 3(d), 91 Stat. 308, 33 U.S.C. § 1602(d) (Supp. III 1979) (Presidential proclamation of International Regulations for Preventing Collisions at Sea may be disapproved by concurrent resolution).

10. International Security Assistance Act of 1977, Pub. L. No. 95–92, § 16, 91 Stat. 614, 622, 22 U.S.C. § 2753(d)(2) (Supp. III 1979) (President's proposed transfer of arms to a third country may be disapproved by concurrent resolution).

11. Act of December 8, 1977, Pub. L. No. 95–223, § 207 (2)(b), 91 Stat. 1625, 1628, 50 U.S.C. 1706(b) (Supp. III 1979) (Presidentially declared national emergency and exercise of conditional powers may be terminated by concurrent resolution).

12. Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95–242, §§ 303, 304, 306, 307, 401, 92 Stat. 120, 130, 134, 137–38, 139, 144, 42 U.S.C. §§ 2160(f), 2155(b), 2157(b), 2153(d) (Supp. III 1979) (Cooperative agreements concerning storage and disposition of spent nuclear fuel, proposed export of nuclear facilities, materials or technology and proposed agreements for international cooperation in nuclear reactor development may be disapproved by concurrent resolution).

B.

BUDGET

13. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344, § 1013, 88 Stat. 297, 334–35, 31 U.S.C. 1403 (The proposed deferral of budget authority provided for a specific project or purpose may be disapproved by an impoundment resolution by either House).

C.

INTERNATIONAL TRADE

14. Trade Expansion Act of 1962, Pub. L. No. 87–794, § 351, 76 Stat. 872, 899, 19 U.S.C. 1981(a) (Tariff or duty recommended by Tariff Commission may be imposed by concurrent resolution of approval).

15. Trade Act of 1974, Pub. L. No. 93–618, §§ 203(c), 302 (b), 402(d), 407, 88 Stat. 1978, 2016, 2043, 2057–60, 2063–64, 19 U.S.C. 2253(c), 2412(b), 2432, 2434 (Proposed Presidential actions on import relief and actions concerning certain countries may be disapproved by concurrent resolution; various Presidential proposals for waiver extensions and for extension of nondiscriminatory treatment to products of foreign countries may be disapproved by simple (either House) or concurrent resolutions).

16. Export-Import Bank Amendments of 1974, Pub. L. No. 93–646, § 8, 88 Stat. 2333, 2336, 12 U.S.C. 635e (Presidentially proposed limitation for exports to USSR in excess of $300,000,000 must be approved by concurrent resolution).

D.

ENERGY

17. Act of November 16, 1973, Pub. L. No. 93–153, § 101, 87 Stat. 576, 582, 30 U.S.C. 185(u) (Continuation of oil exports being made pursuant to President's finding that such exports are in the national interest may be disapproved by concurrent resolution).

18. Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93–577, § 12, 88 Stat. 1878, 1892–1893, 42 U.S.C. 5911 (Rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by resolution of either House).

19. Energy Policy and Conservation Act, Pub. L. No. 94–163, § 551, 89 Stat. 871, 965 (1975), 42 U.S.C. 6421(c) (Certain Presidentially proposed "energy actions" involving fuel economy and pricing may be disapproved by resolution of either House).

20. Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94–258, § 201, 90 Stat. 303, 309, 10 U.S.C. 7422(c)(2)(C) (President's extension of production period for naval petroleum reserves may be disapproved by resolution of either House).

21. Energy Conservation and Production Act, Pub. L. No. 94–385, § 305, 90 Stat. 1125, 1148 (1976), 42 U.S.C. 6834 (Proposed sanctions involving federal assistance and the energy conservation performance standards for new buildings must be approved by resolution of both Houses).

22. Department of Energy Act of 1978—Civilian Applications, Pub. L. No. 95–238, §§ 107, 207(b), 92 Stat. 47, 55, 70, 22 U.S.C. 3224a, 42 U.S.C. 5919(m) (Supp. III 1979) (International agreements and expenditures by Secretary of Energy of appropriations for foreign spent nuclear fuel storage must be approved by concurrent resolution, if not consented to by legislation;) (plans for such use of appropriated funds may be disapproved by either House;) (financing in excess of $50,000,000 for demonstration facilities must be approved by resolution in both Houses).

23. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, §§ 205(a), 208, 92 Stat. 629, 641, 668, 43 U.S.C. §§ 1337(a), 1354(c) (Supp. III 1979) (Establishment by Secretary of Energy of oil and gas lease bidding system may be disapproved by resolution of either House;) (export of oil and gas may be disapproved by concurrent resolution).

24. Natural Gas Policy Act of 1978, Pub. L. No. 95–621, §§ 122(c)(1) and (2), 202(c), 206(d)(2), 507, 92 Stat. 3350,

3370, 3371, 3372, 3380, 3406, 15 U.S.C. 3332, 3342(c), 3346(d)(2), 3417 (Supp. III 1979) (Presidential reimposition of natural gas price controls may be disapproved by concurrent resolution;) (Congress may reimpose natural gas price controls by concurrent resolution;) (Federal Energy Regulatory Commission (FERC) amendment to pass through incremental costs of natural gas, and exemptions therefrom, may be disapproved by resolution of either House;) (procedure for congressional review established).

25. Export Administration Act of 1979, Pub. L. No. 96-72, § 7(d)(B), 7(g)(3), 93 Stat. 503, 518, 520, 50 U.S.C. app. 2406(d)(2)(B), 2406(g)(3) (Supp. III 1979) (President's proposal to domestically produce crude oil must be approved by concurrent resolution;) (action by Secretary of Commerce to prohibit or curtail export of agricultural commodities may be disapproved by concurrent resolution).

26. Energy Security Act, Pub. L. No. 96-294, §§ 104(b)(3), 104(e), 126(d)(2), 126(d)(3), 128, 129, 132(a)(3), 133(a)(3), 137(b)(5), 141(d), 179(a), 803, 94 Stat. 611, 618, 619, 620, 623-26, 628-29, 649, 650-52, 659, 660, 664, 666, 679, 776 (1980) (to be codified in 50 U.S.C. app. 2091-93, 2095, 2096, 2097, 42 U.S.C. 8722, 8724, 8725, 8732, 8733, 8737, 8741, 8779, 6240) (Loan guarantees by Departments of Defense, Energy and Commerce in excess of specified amounts may be disapproved by resolution of either House;) (President's proposal to provide loans or guarantees in excess of established amounts may be disapproved by resolution of either House;) (proposed award by President of individual contracts for purchase of more than 75,000 barrels per day of crude oil may be disapproved by resolution of either House;) (President's proposals to overcome energy shortage through synthetic fuels development, and individual contracts to purchase more than 75,000 barrels per day, including use of loans or guarantees, may be disapproved by resolution of either House;) (procedures for either House to disapprove proposals made under Act are established;) (request by Synthetic Fuels Corporation (SFC) for additional time to submit its comprehensive strategy may be disapproved by resolution of either House;) (proposed amendment to com-

prehensive strategy by SFC Board of Directors may be disapproved by concurrent resolution of either House or by failure of both Houses to pass concurrent resolution of approval;) (procedure for either House to disapprove certain proposed actions of SFC is established;) (procedure for both Houses to approve by concurrent resolution or either House to reject concurrent resolution for proposed amendments to comprehensive strategy of SFC is established;) (proposed loans and loan guarantees by SFC may be disapproved by resolution of either House;) (acquisition by SFC of a synthetic fuels project which is receiving financial assistance may be disapproved by resolution of either House;) (SFC contract renegotiations exceeding initial cost estimates by 175% may be disapproved by resolution of either House;) (proposed financial assistance to synthetic fuel projects in Western Hemisphere outside United States may be disapproved by resolution of either House;) (President's request to suspend provisions requiring build up of reserves and limiting sale or disposal of certain crude oil reserves must be approved by resolution of both Houses).

E.

RULEMAKING

27. Education Amendments of 1974, Pub. L. No. 93–380, § 509, 88 Stat. 484, 567, 20 U.S.C. 1232(d)(1) (Department of Education regulations may be disapproved by concurrent resolution).

28. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96–187, § 109, 93 Stat. 1339, 1364, 2 U.S.C. 438 (d)(2) (Supp. III 1979) (Proposed rules and regulations of the Federal Election Commission may be disapproved by resolution of either House).

29. Act of January 2, 1975, Pub. L. No. 93–595, § 2, 88 Stat. 1926, 1948, 28 U.S.C. 2076 (Proposed amendments by Supreme Court of Federal Rules of Evidence may be disapproved by resolution of either House).

30. Act of August 9, 1975, Pub. L. No. 94–88, § 208, 89 Stat. 433 ,436–37, 42 U.S.C. 602 note (Social Security standards pro-

posed by Secretary of Health and Human Services may be disapproved by either House).

31. Airline Deregulation Act of 1978, Pub. L. No. 95–504, § 43(f)(3), 92 Stat. 1705, 1752, 49 U.S.C. 1552(f) (Supp. III 1979) (Rules or regulations governing employee protection program may be disapproved by resolution of either House).

32. Education Amendments of 1978, Pub. L. No. 95–561, §§ 1138, 1212, 1409, 92 Stat. 2143, 2327, 2341, 2369, 25 U.S.C. 2018, 20 U.S.C. 1221–3(e) (Supp. III 1979) (Rules and regulations proposed under the Act may be disapproved by concurrent resolution).

33. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96–247, § 7(b)(1), 94 Stat. 349, 352–353 (1980) (to be codified in 42 U.S.C. 1997e) (Attorney General's proposed standards for resolution of grievances of adults confined in correctional facilities may be disapproved by resolution of either House).

34. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96–252, § 21(a), 94 Stat. 374, 393 (to be codified in 15 U.S.C. 57a–1) (Federal Trade Commission rules may be disapproved by concurrent resolution).

35. Department of Education Organization Act, Pub. L. No. 96–88, § 414(b), 93 Stat. 668, 685 (1979), 20 U.S.C. 3474 (Supp. III 1979) (Rules and regulations promulgated with respect to the various functions, programs and responsibilities transferred by this Act, may be disapproved by concurrent resolution).

36. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96–364, § 102, 94 Stat. 1208, 1213 (to be codified in 29 U.S.C. 1322a) (Schedules proposed by Pension Benefit Guaranty Corporation (PBGC) which requires an increase in premiums must be approved by concurrent resolution;) (revised premium schedules for voluntary supplemental coverage proposed by PBGC may be disapproved by concurrent resolution).

37. Farm Credit Act Amendments of 1980, Pub. L. No. 96–592, § 508, 94 Stat. 3437, 3450 (to be codified in 12 U.S.C. 2121) (Certain Farm Credit Administration regulations may be disapproved by concurrent resolution or delayed by resolution of either House).

38. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96–510, § 305, 94 Stat. 2767, 2809 (to be codified in 42 U.S.C. 9655) (Environmental Protection Agency regulations concerning hazardous substances releases, liability and compensation may be disapproved by concurrent resolution or by the adoption by either House of a concurrent resolution which is not disapproved by the other House).

39. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96–515, § 501, 94 Stat. 2987, 3004 (to be codified in 16 U.S.C. 470w–6) (Regulation proposed by the Secretary of the Interior may be disapproved by concurrent resolution).

40. Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96–464, § 12, 94 Stat. 2060, 2067 (to be codified in 16 U.S.C. 1463a) (Rules proposed by the Secretary of Commerce may be disapproved by concurrent resolution).

41. Act of December 17, 1980, Pub. L. No. 96–539, § 4, 94 Stat. 3194, 3195 (to be codified in 7 U.S.C. 136w) (Rules or regulations promulgated by the Administrator of the Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act may be disapproved by concurrent resolution).

42. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, §§ 533(a)(2), 1107(d), 1142, 1183(a)(2), 1207, 95 Stat. 357, 453, 626, 654, 659, 695, 718–20 (to be codified in 20 U.S.C. 1089, 23 U.S.C. 402(j), 45 U.S.C. 761, 767, 564(c)(3), 15 U.S.C. 2083, 1276, 1204) (Secretary of Education's schedule of expected family contributions for Pell Grant recipients may be disapproved by resolution of either House;) (rules promulgated by Secretary of Transportation for programs to reduce accidents, injuries and deaths may be disapproved by resolution of either House;) (Secretary of Transportation's plan for the sale of government's common stock in rail system may be disapproved by concurrent resolution;) (Secretary of Transportation's approval of freight transfer agreements may be disapproved by resolution of either House;) (amendments to Amtrak's Route and Service Criteria may be disapproved by resolution of either House;) (Consumer Product Safety Commission regulations may be disapproved by concurrent resolution of

both Houses, or by concurrent resolution of disapproval by either House if such resolution is not disapproved by the other House).

F.

MISCELLANEOUS

43. Federal Civil Defense Act of 1950, Pub. L. No. 81–920, § 201, 64 Stat. 1245, 1248, 50 app. U.S.C. 2281(g) (Interstate civil defense compacts may be disapproved by concurrent resolution).

44. National Aeronautics and Space Act of 1958, Pub. L. No. 85–568, § 302c, 72 Stat. 426, 433, 42 U.S.C. 2453 (President's transfer to National Air and Space Administration of functions of other departments and agencies may be disapproved by concurrent resolution).

45. Federal Pay Comparability Act of 1970, Pub. L. No. 91–656, § 3, 84 Stat. 1946, 1949, 5 U.S.C. 5305 (President's alternative pay plan may be disapproved by resolution of either House).

46. Act of October 19, 1973, Pub. L. No. 93–134, § 5, 87 Stat. 466, 468, 25 U.S.C. 1405 (Plan for use and distribution of funds paid in satisfaction of judgment of Indian Claims Commission or Court of Claims may be disapproved by resolution of either House).

47. Menominee Restoration Act, Pub. L. No. 93–197, § 6, 87 Stat. 770, 773 (1973), 25 U.S.C. 903d(b) (Plan by Secretary of the Interior for assumption of the assets the Menominee Indian corporation may be disapproved by resolution of either House).

48. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, §§ 303, 602(c)(1) and (2), 87 Stat. 774, 784, 814 (1973) (District of Columbia Charter amendments ratified by electors must be approved by concurrent resolution;) (acts of District of Columbia Council may be disapproved by concurrent resolution;) (acts of District of Columbia Council under certain titles of D.C. Code may be disapproved by resolution of either House).

49. Act of December 31, 1975, Pub. L. No. 94–200, § 102, 89 Stat. 1124, 12 U.S.C. 461 note (Federal Reserve System Board of Governors may not eliminate or reduce interest rate differentials between banks insured by Federal Deposit Insurance Corporation and associations insured by Federal Savings and Loan Insurance Corporations without concurrent resolution of approval).

50. Veterans' Education and Employment Assistance Act of 1976, Pub. L. No. 94–502, § 408, 90 Stat. 2383, 2397–98, 38 U.S.C. 1621 note (President's recommendation for continued enrollment period in Armed Forces educational assistance program may be disapproved by resolution of either House).

51. Federal Land Policy and Management Act of 1976, Pub. L. No. 94–579, §§ 203(c), 204(c)(1), 90 Stat. 2743, 2750, 2752, 43 U.S.C. 1713(c), 1714 (Sale of public lands in excess of two thousand five hundred acres and withdrawal of public lands aggregating five thousand acres or more may be disapproved by concurrent resolution).

52. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95–19, § 401, 91 Stat. 39, 45, 2 U.S.C. 359 (Supp. III 1979) (President's recommendations regarding rates of salary payment may be disapproved by resolution of either House).

53. Civil Service Reform Act of 1978, Pub. L. No. 95–454, § 415, 92 Stat. 1111, 1179, 5 U.S.C. 3131 note (Supp. III 1979) (Continuation of the Senior Executive Service may be disapproved by concurrent resolution).

54. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95–523, § 304(b), 92 Stat. 1887, 1906, 31 U.S.C. 1322 (Supp. III 1979) (Presidential timetable for reducing unemployment may be superseded by concurrent resolution).

55. District of Columbia Retirement Reform Act, Pub. L. No. 96–122, § 164, 93 Stat. 866, 891–92 (1979) (Required reports to Congress on the District of Columbia retirement program may be rejected by resolution of either House).

56. Act of August 29, 1980, Pub. L. No. 96–332, § 2, 94 Stat. 1057, 1058 (to be codified in 16 U.S.C. 1432) (Designation of marine sanctuary by the Secretary of Commerce may be disapproved by concurrent resolution).

ADDENDUM 2

CONGRESSIONAL DISAPPROVAL UNDER SECTION 244: 1953–1981 [a]

Congress	Years	Cases Considered	Cases Disapproved
83d	1953–54	[b]	0
84th	1955–56	696	5 [c]
85th	1957–58	[b]	0
86th	1959–60	[b]	0
87th	1961–62	[b]	0
88th	1963–64	[b]	0
89th	1965–66	1,865	111 [d]
90th	1967–68	433 [e]	58 [f]
91st	1969–70	265 [e]	24 [g]
92d	1971–72	436	7 [h]
93d	1973–74	208	6 [i]
94th	1975–76	577	16 [j]
95th	1977–78	270	1 [k]
96th	1979–80	419	1 [l]
97th	1981 [m]	532	0
Total		More than 5,701	229

[a] From 1940 to 1948, suspensions of deportation were subject to disapproval of Congress by concurrent resolution. As of April 21, 1947, 19,000 suspensions had been recommended to Congress, none of which had been rejected. *See Regulating Powers of Attorney General to Suspend Deportation of Aliens: Hearings, supra* note 14, at 33 (statement of Edward J. Shaughnessy (INS)). Between 1948 and 1952, there was no disapproval mechanism, as cancellation of deportation required a concurrent resolution of affirmative approval. The current procedure of section 244(c)(2), which authorizes rejection of the recommended grant of permanent residence by a resolution of disapproval in either House, dates from 1952. The difference between the number of cases considered and the number of cases disapproved represents the number of deportable aliens granted permanent residence.

[b] Not available. Data tend to be available only in years in which Congress has disapproved suspensions.

[c] S. Res. 124; S. Rep. No. 710; 101 Cong. Rec. 10682–83 (1955); S. Res. 296; S. Rep. No. 2349, 102 Cong. Rec. 11538 (1956).

[d] H.R. Res. 606; H.R. Rep. No. 1167; 111 Cong. Rec. 27420 (1965); H.R. Res. 1030; H.R. Rep. No. 2151; 112 Cong. Rec. 26088 (1966).

[e] This figure represents a minimum number of the cases considered. Data are partially unavailable.

[f] H.R. Res. 981; H.R. Rep. No. 1009; 113 Cong. Rec. 36535–37 (1967).

[g] H.R. Res. 422; H.R. Rep. No. 467; 115 Cong. Rec. 28802 (1969); H.R. Res. 540; H.R. Rep. No. 507; 115 Cong. Rec. 28802 (1969).

[h] S. Res. 194; S. Rep. No. 454; 117 Cong. Rec. 42281 (1971); H.R. Res. 1155; H.R. Rep. No. 1597; 118 Cong. Rec. 36419 (1972); S. Res. 366; S. Rep. No. 1171; 118 Cong. Rec. 31617 (1972).

[i] H.R. Res. 1518; 120 Cong. Rec. 41412 (1974).

[j] H.R. Res. 926; 121 Cong. Rec. 40800 (1975); H.R. Res. 1558; H.R. Rep. No. 1691; 122 Cong. Rec. 33017 (1976).

[k] H.R. Res. 796; H.R. Rep. No. 692; 123 Cong. Rec. 34987 (1977).

[l] H.R. Res. 817; H.R. Rep. No. 1518; 126 Cong. Rec. H11747 (daily ed. Dec. 3, 1980).

[m] Through October, 1981. There have been no disapprovals to date in the 97th Congress.

Table based upon data compiled by L. Fisher, Specialist in American National Government, Congressional Research Service, Library of Congress, Nov. 12, 1981. Statistics for "Cases Considered" are approximate.

O

Office - Supreme Court, U.S.
FILED
FEB 11 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1832, 80-2170, and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE UNITED STATES SENATE, APPELLEE-PETITIONER

MICHAEL DAVIDSON,
Senate Legal Counsel,
M. ELIZABETH CULBRETH,
Deputy Senate Legal Counsel,
CHARLES TIEFER,
MORGAN J. FRANKEL,
Assistant Senate Legal Counsels,
1413 Dirksen Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435

TABLE OF CONTENTS

	Page
Introduction	1
Argument	4
I. Because Section 244 May Be Judged Only As An Integrated Whole, Chadha Lacks Standing	4
1. Respondents Advance a Novel and Unsupportable Test of Severability	4
2. Respondents Misconstrue the Legislative History of Section 244	5
3. Section 244 May Not Be Judicially Refashioned as Respondents Propose	7
4. Therefore, the Court of Appeals Rendered an Unnecessary Judgment on the Constitutionality of Section 244	10
II. The Representative Branches May Share the Power to Grant Dispensation from Mandatory Deportation Laws	14
Conclusion	18

TABLE OF AUTHORITIES

Cases:	
Baker v. *Carr*, 369 U.S. 186 (1962)	5
Buckley v. *Valeo*, 424 U.S. 1 (1976)	10, 13, 14
Califano v. *Westcott*, 443 U.S. 76 (1979)	11
Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936)	13
Champlin Refining Co. v. *Corporation Commission*, 286 U.S. 210 (1932)	4, 8
Chicago & Southern Air Lines v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948)	17
Consumer Energy Council v. *FERC*, Nos. 80–2184, 2312 (D.C. Cir. Jan. 29, 1982)	2
Dames & Moore v. *Regan*, 101 S. Ct. 2972 (1981)	15
Dorchy v. *Kansas*, 264 U.S. 286 (1924)	4
Federal Trade Commission v. *Ruberoid Co.*, 343 U.S. 470 (1952)	15, 17
Hill v. *Wallace*, 259 U.S. 44 (1922)	10
Humphrey's Executor v. *United States*, 295 U.S. 602 (1935)	18

Cases—Continued

	Page
Iowa-Des Moines National Bank v. *Bennett*, 284 U.S. 239 (1931)	12
Jay v. *Boyd*, 351 U.S. 345 (1956)	16
Marchetti v. *United States*, 390 U.S. 39 (1968)	7
Myers v. *United States*, 272 U.S. 52 (1926)	18
Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977)	17
Orr v. *Orr*, 440 U.S. 268 (1979)	11
Stanton v. *Stanton*, 421 U.S. 7 (1975)	12
United States v. *Alessio*, 528 F. 2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976)	17
United States v. *Jackson*, 390 U.S. 570 (1968)	13
United States v. *Nixon*, 418 U.S. 683 (1974)	17
United States ex rel. Hintopoulos v. *Shaughnessy*, 233 F. 2d 705 (2d Cir. 1956), *aff'd on other grounds*, 353 U.S. 72 (1957)	10, 16
Valley Forge Christian College v. *Americans United for Separation of Church and State, Inc.*, 50 U.S.L.W. 4103 (U.S. Jan. 12, 1982) (No. 80–327)	12, 14
Wiener v. *United States*, 357 U.S. 349 (1958)	18

Constitution and Statutes:

United States Constitution	
Art. I, Sec. 7	2, 14
Art. I, Sec. 9	9
Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206	5
Alien Registration Act of 1940, Pub. L. No. 670, 54 Stat. 670	6, 8, 9
Civil Aeronautics Act, ch. 601, § 801, 52 Stat. 973, 1014 (1938) (current version at 49 U.S.C. 1461)	17
Federal Tort Claims Act, 2 U.S.C. 190g	6
Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 8 U.S.C. 1101 *et seq.*, as amended	2, 3, 6, 9
Natural Gas Policy Act of 1978, § 202(c), 15 U.S.C. 3342(c) (Supp. III 1979)	2
War Powers Resolution, 50 U.S.C. 1541–1548	2
8 U.S.C. 1421(a)	14

Miscellaneous:

	Page
86 Cong. Rec. 8215 (1940)	8
87 Cong. Rec. 7675 (1941)	9
108 Cong. Rec. 22607 (1962)	6
128 Cong. Rec. S470–71 (daily ed. Feb. 8, 1982)	2
H.R. 9766, 76th Cong., 3d Sess. (1940)	8, 9
H.R. 2933, 80th Cong., 1st Sess. (1947)	6
S. Res. No. 315, 97th Cong., 2d Sess. (1982)	2
H.R. Rep. No. 647, 80th Cong., 1st Sess. (1947)	6
H.R. Rep. No. 362, 81st Cong., 1st Sess. (1949)	5, 6
H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952)	9
S. Rep. No. 2031, 76th Cong., 3d Sess. (1940)	8, 9
S. Rep. No. 1137, 82d Cong., 2d Sess. (1952)	16
Annual Report of the INS (1977)	6
2 C. Gordon & H. Rosenfield, Immigration Law & Procedure (rev. ed. 1981)	15, 16
J. Landis, The Administrative Process (1938)	17
L. White, The Federalists (1948)	17
Letter from Attorney General Robert H. Jackson to Harold D. Smith, Director, Bureau of the Budget (June 25, 1940)	9
Petition for Certiorari, *INS* v. *Wang*, 450 U.S. 139 (1981)	16

In the Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 80-1832, 80-2170, 80-2171

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE UNITED STATES SENATE, APPELLEE-PETITIONER

INTRODUCTION

Over the last fifty years, the representative branches have resolved numerous difficult issues through the enactment of provisions for congressional approval or disapproval. Among those currently in effect are statutes which govern the relation-

ship between the Congress and the executive in critical areas of foreign affairs and national security, the budget, international trade, and energy. *See* Sen. Br. 37–48. With the sole exception of the War Powers Resolution, 50 U.S.C. 1541–1548 (1976), these laws were approved by the Presidents to whom they were presented.

Even as it struck down section 244(c)(2) of the Immigration and Nationality Act, the court of appeals appreciated the novelty of its holding and the disparateness of the public issues which provisions for legislative review address, and took care to limit its holding to the Immigration and Nationality Act. Citing the Nuclear Non-Proliferation Act and the Federal Trade Commission Act as two examples, the court cautioned that some statutes "might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device" (J.S. 55a).[1] It eschewed respondents' Presentation Clause theory, which is designed to invalidate all of the many accommodations between the Congress and the President that utilize procedures for congressional review. Instead, the court analyzed the features peculiar to section 244 and concluded that section 244 violated the separation of powers, without intimating what the result ought to be in other contexts.[2]

---

[1] *See Consumer Energy Council* v. *FERC*, Nos. 80-2184, 80-2312, slip op. at 42 (D.C. Cir. Jan. 29, 1982) ("the *Chadha* court sought to minimize the reach of its holding").

[2] The court of appeals referred only briefly at the end of its long opinion to Article I, Section 7 (J.S. 59a), after reiterating that "the essence of the violation here was the violation of the separation of power rule" (J.S. 55a). In contrast, the D.C. Circuit, in *Consumer Energy Council* v. *FERC*, *supra* n.1, rendered a sweeping judgment on the scope of the Presentation Clause. The court invalidated section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. 3342(c) (Supp. III 1979), which provides for legislative review of a natural gas pricing rule of the Federal Energy Regulatory Commission, stating: "The primary basis of this holding is that the one-house veto violates Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one house of Congress." Slip op. at 37.

On February 8, 1982, the Senate directed the Senate Legal Counsel to move for leave to intervene after judgment in order to seek further review of the D.C. Circuit's holding in this case. *See* S. Res. 315, 97th Cong., 2d Sess., 128 Cong. Rec. S470–71 (daily ed. Feb. 8, 1982).

The INS, in what amounts to an appeal from the narrow opinion of the court of appeals, asks (INS Br. 21–26) this Court to adopt a theory that would invalidate all provisions for legislative review. The American Bar Association supports (ABA Br. 1) this view. Both the respondents and the amici ask the Court to discard its traditional rules of restraint and to upset scores of major federal statutes whose terms and operation are not illuminated by the administrative record in this case.[3]

In Part I, *infra*, we reply to several new arguments which respondents make to support their claim that this Court may sever and refashion section 244 so that it delegates to the executive the final authority to grant permanent residence to deportable aliens, a power which the Congress has consistently denied it. Chadha would have standing to raise his constitutional challenge only if the legislative review authority of section 244 could be severed from the executive's recommendatory authority. The language, legislative history, and method of operation of section 244 demonstrate, however, that it may not be severed. Congress designed section 244 as an integrated procedure, and it may be challenged only in its entirety. Furthermore, it is a legislative, not a judicial, responsibility to revise it if it is unconstitutional. Contrary to respondents' assertion, the Court may not decide the constitutionality of section 244 in this case, because its inseverability means that no relief can be granted to Chadha. Fortunately for Chadha, the Court need not decide the case to provide him with relief from deportation, because, as he concedes, his marriage to an American citizen and the Refugee Act of 1980 render him "apparently eligible for relief from deportation" (Chadha Br. 25).

[3] The INS also reverses the consistent position of the executive branch over the past forty years. Our opening brief discussed (Sen. Br. 11–12) the close relationship between the legislative review provisions of the Immigration and Nationality Act and those of the Reorganization Act of 1939. We pointed out (Sen. Br. 12, 14, 16) that since the adoption of the 1939 Act the executive has consistently defended the constitutionality of the reorganization provisions. In response, the INS simply repudiates (INS Br. 58 n.37) that historic executive position. The failure of the executive to harmonize its position in this case with its longstanding view further highlights the caution with which INS's request for a sweeping constitutional decision should be considered.

In Part II, *infra*, we demonstrate that the discretionary power shared by the branches under section 244 is not an adjudicatory or an enforcement power. Section 244 is a singular arrangement through which the political branches share the exercise of discretion to grant aliens dispensation from the requirements of a mandatory deportation law. It is a unique exercise of the power of the national government to admit aliens, which the Court may uphold without its anticipating how it might decide future challenges to other provisions for legislative review.

ARGUMENT

I

BECAUSE SECTION 244 MAY BE JUDGED ONLY AS AN INTEGRATED WHOLE, CHADHA LACKS STANDING

The history of section 244 is a history of repeated rejection by the Congress of requests from the executive for final authority to grant permanent residence to deportable aliens. *See* Sen. Br. 9–17. Yet respondents request this Court to interpret section 244 to grant to the executive the very power which the Congress has denied to it.

1. RESPONDENTS ADVANCE A NOVEL AND UNSUPPORTABLE TEST OF SEVERABILITY

The respondents propound a novel test of severability, which draws no support from the decisions of this Court. Chadha suggests (Chadha Br. 28), "The proper question . . . is, what would Congress have done had it known that its veto provisions were unconstitutional and thus could not be included?" *See* INS Br. 62. This Court has never determined severability by speculating what Congress would have done had it known what the Court might someday decide. It has sought instead to assess the actual intent of the enacting Congress: whether it "intended the provision to stand, in case others included in the act and held bad should fall." *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924).[4] The Court should reject respondents' speculation

[4] The question of intent is not even reached unless "what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932). *See* pp. 7–9, *infra*.

that Congress would have enacted another law delegating final authority to the executive, if it had known that section 244(c)(2) would one day be held unconstitutional. Under the separation of powers this Court may not now make that legislative decision.[5]

2. RESPONDENTS MISCONSTRUE THE LEGISLATIVE HISTORY OF SECTION 244

In the court of appeals, the respondents relied on a remark of Representative Dies' in 1937 as the key fragment of relevant legislative history. This became the sole basis for the court of appeals' conclusion "that section 244's purpose was to alleviate the onerous burden of numerous private bills" (J.S. 14a–15a). Our opening brief noted (Sen. Br. 25 n.41) that Representative Dies had been speaking, three years before the antecedent of section 244 was enacted, in favor of a different bill, to give the Attorney General final authority to grant permanent residence to deportable aliens without legislative review and that this bill had failed. Now, in their opposing briefs, respondents rest their case (INS Br. 62–63; Chadha Br. 32) on another fragment of legislative history, a 1949 report of the House Judiciary Committee, H.R. Rep. No. 362, 81st Cong., 1st Sess. (1949), which criticized as unworkable the affirmative approval procedure in the Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206.

However, the bill reported by the committee in 1949 was a further rejection of an administration bill to give the Attorney General final authority to cancel deportations and to grant permanent residence. In 1947, the committee had rejected the administration's request for final authority, because "the best interests of the country would be served by limiting the pro-

[5] It is impossible to determine what other statute Congress might have enacted. An accommodation could have taken various forms, such as temporary authority or executive authority limited in other ways. For example, the House bill in the 76th Congress (which may be the best indication of what the Congress would have done without the Senate compromise) authorized temporary suspensions of deportation by the executive, but required legislation to cancel deportations. *See* Sen. Br. 11. This Court cannot divine what Congress would have done "without [making] an initial policy determination of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

posed extended powers," and had reported instead an amendment to provide that "the *recommendation* of the Attorney General can be rejected by a resolution of either of the two Houses." H.R. Rep. No. 647, 80th Cong., 1st Sess. 2–3 (1947) (emphasis added). The bill reported by the committee in 1949 "simply repeat[ed] the language contained in the bill passed by the House in 1947. . . ." H.R. Rep. No. 362, *supra* p. 5, at 2. Hence, the 1949 report does not suggest that the committee would have proposed legislation to grant the executive final authority rather than relying on private legislation.[6]

Moreover, respondents' statutory argument fails to give effect to the actual choice made by the Congress. In enacting

[6] The respondents also exaggerate (INS Br. 62–64; Chadha Br. 29–32) the concern of the Congress, during the consideration of section 244 and its antecedents, over private immigration bills. The Alien Registration Act of 1940, Pub. L. No. 670, 54 Stat. 670, was enacted during the 76th Congress. Virtually no private immigration legislation existed before 1937, and the 75th Congress enacted only thirty private immigration and nationality bills. The single Congress in which the greatest number of private immigration and nationality bills, 1,227, were enacted, was the 84th Congress, several years after the passage of the Immigration and Nationality Act of 1952. *See* Annual Report of the INS, Table 55, at 135 (1977). The facts belie Chadha's argument that in 1952 the 82d Congress would have delegated final authority to the executive rather than "to return to the days of the private bill (Chadha Br. 32). To the contrary, private immigration and nationality legislation became a much *greater* part of the work of succeeding Congresses.

As part of its request in 1947 for final authority to cancel deportations, the administration proposed to restrict private immigration bills to aliens outside the United States. H.R. 2933, § 3, 80th Cong., 1st Sess. (1947). The House Judiciary Committee rejected this bar, and reported, with its 1947 deportation bill, a provision to limit the introduction of private bills to aliens who the Attorney General indicated had exhausted all administrative remedies. H.R. Rep. No. 647, *supra*, at 3–4. Even this limited restriction on private bills failed. In contrast, during the same period Congress did prohibit by statute the consideration of private bills for injuries compensable under the Federal Tort Claims Act, 2 U.S.C. 190g (1976).

In 1962, when Congress gave section 244 its present form, the House rejected a Senate bill to grant the Attorney General discretion to record the permanent residence of aliens who had entered the United States before December 24, 1952: "If there are meritorious cases, then we feel we can deal with them adequately through existing suspension of deportation laws *or through private legislation*." 108 Cong. Rec. 22607 (1962) (remarks of Rep. Walter) (emphasis added).

section 244 the Congress considered three alternatives: to use private legislation exclusively (and perhaps rarely) to grant relief, to grant final authority to the executive, or to devise an arrangement for shared responsibility. The Congress firmly rejected the grant of final authority to the executive. We detailed (Sen. Br. 9–17) the history of Congress's repeated rejection of executive requests for final authority to cancel deportations, between 1934 and 1938, and in 1947, 1956, and 1957, which respondents have not rebutted. After barring the grant of final authority to the executive, the Congress made a series of choices from 1940 to 1962 regarding the sharing of discretionary authority to grant relief, while retaining and using the alternative of private immigration legislation. This history precludes the Court from interpreting section 244 to grant the executive final authority to cancel deportations.[7]

3. SECTION 244 MAY NOT BE JUDICIALLY REFASHIONED AS RESPONDENTS PROPOSE

The court of appeals severed subsection 244(c)(2) from section 244 because "section 244(a) operates independently of section 244(c)(2)" and is a complete delegation of authority to the Attorney General to grant permanent residence to deportable aliens (J.S. 15a). In our opening brief (Sen. Br. 24–25), we argued that subsection 244(a) is not an independent grant of

[7] Of course, the current or a future Congress might make a choice different from that which Congress repeatedly made between 1934 and 1962. To demonstrate that the legislative process remains open, we brought to the Court's attention (Sen. Br. 28 n.46) bills which were reported by the Senate and House Judiciary Committees in the 96th Congress, but were not enacted, to eliminate congressional review of suspensions of deportation. The respondents suggest (INS Br. 64–65) that the Court should conclude from these repeal proposals that the present Congress would favor a grant of final executive authority over the consideration of private bills. That suggestion is irrelevant, for the Court must construe the legislation which the Congress has enacted, not anticipate the legislation that Congress may pass. *See Marchetti* v. *United States*, 390 U.S. 39, 59–60 (1968) ("We cannot know how Congress would assess the competing demands . . .; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values").

authority, but an introduction to subsections 244(c) and (d), in which the authority to cancel deportations and to record permanent residence is legislated. Without subsection 244(c)(2), section 244 is not "fully operative as a law." *Champlin Refining Co.* v. *Corporation Commission, supra* n.4, 286 U.S. at 234.

Neither respondent defends (INS Br. 60–65; Chadha Br. 26–32) the untenable conclusion of the court of appeals that subsection 244(a) is an independent grant of final authority to the Attorney General. Instead, respondents recognize the need for subsection 244(c)(2) to effect the grant of permanent residence. Chadha describes the final sentence of subsection 244(c)(2), which requires the Attorney General to cancel deportation proceedings if neither House passes a resolution of disapproval, as "the operative provision" (Chadha Br. 28). To make it operate, he advances the fiction of "treating any veto which occurs as a nullity, and hence the equivalent of no veto at all" (*id*). The INS proposes (INS Br. 61 n.39) to transform section 244 into a "report and wait" statute. INS would report to Congress every suspension pursuant to subsection 244(c)(1), and each deportation would be canceled at the end of the waiting period, unless the Congress had enacted a statute deporting the alien. In this way, INS elaborates, "Congress would retain the power to pass a *law*, in accordance with the requirements of Article I, requiring the alien's deportation, subject to whatever restraints may be imposed by the Bill of Attainder Clause, Art. I, § 9" (*id.*). Respondents advance these arguments for the first time in this Court.

The interpretations which respondents propose are not the statute which Congress enacted. At the very time Congress was considering the Alien Registration Act of 1940, in which it first adopted a procedure to cancel deportations, the Congress also had before it H.R. 9766, 76th Cong., 3d Sess. (1940), a bill to require the Attorney General to deport an individual alien, Harry Bridges. The bill passed the House on June 13, 1940. 86 Cong. Rec. 8215 (1940). Attorney General Jackson condemned the bill as "an historical departure from an unbroken American practice and tradition. It would be the first time that an act of Congress has singled out a named individual for deportation." S. Rep. No. 2031, 76th Cong., 3d Sess. 9 (1940) (reprinting

Jackson's letter of June 18, 1940). One week later, on June 25, 1940, the Attorney General examined the enrolled bill for the Alien Registration Act, including its provisions for the cancellation of deportations, and found "no objection to the approval of the bill." [8]

Under the successor to the Alien Registration Act, the Congress does not determine the deportability of individual aliens. The Congress determines only whether to grant permanent relief from deportation. If relief is denied, deportation results from the executive's adjudicatory determination of deportability based on general standards established by legislation. The Attorney General attacked the bill to deport Bridges, saying, "By this bill the United States would deny faith and credit to its own duly conducted legal proceedings." S. Rep. No. 2031, *supra* p. 8, at 9. That criticism could not be levied against the Alien Registration Act, which provided not for the reversal of final executive decisions but for the acceptance or rejection of executive recommendations to grant relief. Congress followed the Attorney General's advice; the Bridges deportation bill failed and the Alien Registration Act became law.[9] Nevertheless, the INS now asks this Court to construe section 244 to require the Congress to enact legislation to deport individual aliens.[10] Although the respondents have correctly abandoned the statutory analysis of the court of appeals and now recognize that subsection 244(c)(2) is necessary to the statute, their efforts to reform section 244 violate the intent of Congress that permanent residence be "granted through congressional action." [11] The severability clause in the Immigration and Nation-

[8] Letter from Attorney General Robert H. Jackson to Harold D. Smith, Director, Bureau of the Budget (June 25, 1940) (on file in the National Archives).

[9] The Senate Committee on Immigration amended the Bridges bill to direct the Attorney General to investigate Bridges and to deport him in the manner provided by law "if, in the opinion of the Attorney General, such investigation produces facts justifying such action. . . ." H.R. 9766, as reported with amendments by S. Rep. No. 2031, *supra* p. 8. The bill then died. In the next Congress, the House passed another bill to deport Bridges, 87 Cong. Rec. 7675 (1941), which also failed in the Senate.

[10] As the Solicitor General recognizes (INS Br. 61 n.39), private deportation legislation would invite serious questions under the Bill of Attainder Clause, Article I, Section 9.

[11] H.R. Rep. No. 1365, 82d Cong., 2d Sess. 63 (1952). *See* Sen. Br. 26 n.42.

ality Act does not aid respondents' proposals to revise section 244, for no severability clause authorizes the Court "to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. *This is legislative work beyond the power and function of the court.*" *Hill* v. *Wallace*, 259 U.S. 44, 70 (1922) (emphasis added).

4. THEREFORE, THE COURT OF APPEALS RENDERED AN UNNECESSARY JUDGMENT ON THE CONSTITUTIONALITY OF SECTION 244

If the Court were to conclude that Congress's role in granting permanent residence under section 244 is unconstitutional, it would be required, in fulfillment of its obligation to interpret faithfully the intent of the enacting Congress, to invalidate the entire procedure for granting relief.[12] Chadha could gain nothing from such a resolution of the case because neither the Court nor the INS would have statutory authority to grant relief under the statute as stricken and he would remain deportable for having overstayed his visa. *See* Sen. Br. 24–28.[13] Fortunately for Chadha, this question is academic, for he has other statutory means available to acquire permanent residence. *See* Chadha Br. 25; p. 13, *infra*.

The INS argues "that a party may raise a constitutional claim even if the challenged provision ultimately may not be

---

[12] This would leave to the present or a future Congress the legislative question of whether to replace section 244 with a delegation of final authority to the executive, or with another procedure, to grant permanent residence to deportable aliens. There would be no reason to disturb prior grants of permanent residence through section 244, as Chadha speculates (Chadha Br. 29 n. 11), for the Court may recognize their "*de facto* validity." *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976) (per curiam).

[13] *See United States ex rel. Hintopoulos* v. *Shaughnessy*, 233 F.2d 705, 708–09 (2d Cir. 1956), *aff'd on other grounds*, 353 U.S. 72 (1957) ("if the grant of power [to approve or to withhold a suspension] were invalid, the appellants and all other hardship cases would stand confronted with rigid deportation provisions as were their predecessors before the law was liberalized").

severable in a way that would entitle the claimant to relief" (INS. Br. 75). Chadha argues that "the court below was in error in first ruling on severability because it departed from the practice this Court has consistently followed in deciding severability only after finding an act to be unconstitutional" (Chadha Br. 27). Neither proposition is correct.

This Court does not give advisory opinions. Thus, it has never held an act of Congress unconstitutional while barring relief to the litigant because of the inseverability of the invalidated statute. The INS cites (INS Br. 75) *Orr* v. *Orr*, 440 U.S. 268 (1979), in which the Court granted a husband standing to challenge on equal protection grounds an Alabama divorce law providing for the payment of alimony only to wives. The Court observed (*id.* at 272) that it was impossible to know whether the state legislature would respond to the invalidation of the gender-based law by repealing the provision for alimony or by extending alimony benefits to spouses of both sexes. While it was *possible* that the Alabama legislature would act in such a way that the husband would gain nothing, the Court refused to speculate on how the legislature might reform the statute. It is always true, and never relevant, that subsequent legislative amendment may alter a litigant's ultimate relief. The Court should not speculate on the possible response of Congress to this litigation; it is the past action of the Congress in enacting an inseverable statute, not a speculative future action, which bars the award of relief to Chadha.

The INS also cites (INS Br. 75) *Califano* v. *Westcott*, 443 U.S. 76 (1979), in which this Court affirmed the invalidation of a gender-based classification in a federal welfare statute and sustained the lower court's remedy of extending the benefits in disregard of the invalid classification. The Court provided the litigant with relief after concluding (*id.* at 90) that the statute *was* severable. Indeed, as the Court observed (*id.* at 90–91), no party had argued that the statute's invalid classification was inseverable from the entire Aid to Families with Dependent Children program. At issue was not whether the program could be severed, but how the program should be ad-

ministered to conform to the intent of Congress after the offending classification was excised. *See id.* at 91–93.[14]

Thus, in each of these cases, the litigant either received relief when the Court severed the statute or obtained a possibility of relief, depending on subsequent judicial or legislative action. In contrast, the INS suggests that the Court should invalidate section 244 as a whole, if it concludes that its subsections may not be severed, even though such action would permanently foreclose Chadha from receiving relief. The INS defends this novel and extreme position by suggesting that, if Chadha does not have standing, "a legislature could insulate *any* unconstitutional aspect of a benefit program from challenge simply by specifying that the constitutionally dubious aspect is not severable from the remainder of the program" (INS Br. 75).[15] INS's fear is misplaced. First, this case is peculiarly distinct from the generic "underinclusive benefits" cases. As Justice Brandeis observed, in discrimination cases "[t]he right invoked is that to equal treatment; and such treatment will be attained if either . . . [others' burdens] are increased or their own reduced." *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931). Moreover, the conjecture that Congress would deliberately prevent judicial review by inserting an unconstitutional provision in an inseverable statute is unwarranted. The enactment of procedures for legislative review followed careful and conscientious consideration of the constitutional

[14] In the third case cited by INS (INS Br. 75), *Stanton* v. *Stanton*, 421 U.S. 7 (1975), the Court invalidated the application of Utah's age-of-majority law to child support obligations. The Court remanded to the Supreme Court of Utah to determine whether the age of majority should be set at 18 or 21, an issue of state law. Even if this may be seen as a standing question (the Court did not discuss it as one, *id.* at 17–18), it indicates a rejection of only the contention that the mere *possibility* of a litigant's ultimate inability to secure relief under state law, based upon subsequent action by an independent state authority, should preclude adjudication of a federal right.

[15] Generally " '[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.' *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S., at 227." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 50 U.S.L.W. 4103, 4110 (U.S. Jan. 12, 1982) (No. 80-327).

issues as illuminated by contemporary decisions of this Court. *See* Sen. Br. 12 n. 12. Section 244 is inseverable because the Congress created a unitary procedure to grant relief to aliens, not because it sought to prevent judicial review.

Nor is Chadha correct in his argument that it is the practice of this Court to decide that a statute is unconstitutional before deciding whether it is severable. It is true that in *United States* v. *Jackson*, 390 U.S. 570 (1968), and *Buckley* v. *Valeo*, *supra* n. 12, the Court severed unconstitutional statutes in opinions in which the discussion of unconstitutionality preceded the discussion of severability. However, those are simply indications of the order in which parts of an opinion may be arranged. We know of no case in which the Court has gratuitously decided that an act of Congress is unconstitutional even though the invalidation provided no relief because of the inseverability of the statute. *See Carter* v. *Carter Coal Co.*, 298 U.S. 238, 316 (1936) (holding price-fixing provisions of statute inseverable and "thus disposed of without coming to the question of their constitutionality").

Further, respondents continue to press this constitutional challenge although Chadha has been eligible to obtain an adjustment of status, merely by filing an immediate relative petition, for the past one and one-half years.[16] Chadha concedes that his marriage and the Refugee Act of 1980 render him "apparently eligible for relief from deportation" (Chadha Br. 25). He thus recognizes that the assertion of the court of appeals that "the Attorney General will deport Chadha . . . unless we rule in Chadha's favor" (J.S. 19a) is inaccurate. Chadha's justification for pursuing a constitutional judgment, instead of the alternative statutory avenues for relief, is his interest in acquiring citizenship sooner, even though there is no statutory basis for a retroactive grant of permanent residence. *See* Sen. Br. 20 n. 33.[17]

[16] Chadha states that "if he adjusts his status on account of his wife's citizenship, he must wait three years in addition to the year it is likely to take to change his current status" (Chadha Br. 26). Having so far refused for one and one-half years even to file the petition, Chadha is not in a position to base his right to constitutional adjudication on administrative delay in processing adjustment of status petitions.

[17] The court of appeals' deduction, in order to keep this case alive, that "the five-year waiting period for citizenship has already expired, thus mak-

Hence, Chadha's sole interest in this litigation is to pursue a doubtful claim that he is entitled to earlier citizenship through naturalization. This case is no longer, in any real sense, a proceeding to review a final order of deportation, and it has become an inappropriate vehicle to adjudicate the significant constitutional issues presented to the Court.[18]

II.

THE REPRESENTATIVE BRANCHES MAY SHARE THE POWER TO GRANT DISPENSATION FROM MANDATORY DEPORTATION LAWS

We agree with the conclusion of the court of appeals (*see* n. 2, *supra*) that the key constitutional issue in this case concerns separation of powers principles, not conformance with Article I, Section 7. Congressional review under subsection 244(c) does not attempt or purport to be an act of original lawmaking.[19] Such legislative review is undertaken under the limited authority of a prior statute, which was enacted under the procedures mandated by Article I, Section 7. INS's argument (INS Br. 21–26) establishes the undeniable importance of bicameralism and presentation. It does not, however, help the Court resolve the constitutionality of a statute enacted under those procedures. The equation of legislative review pursuant to a prior statute with original lawmaking could result in the invalidation of scores of major statutes without any consideration of their individual status under the separation of powers. Such an

---

ing Chadha eligible to apply for naturalization" (J.S. 17a–18a n.6), was both a judicial invention and beyond the court's jurisdiction. Exclusive federal jurisdiction to naturalize citizens is conferred upon district courts, 8 U.S.C. 1422(a) (1976). Thus, regardless of the disposition of this case, Chadha can become naturalized only by filing a naturalization petition in a district court. The INS's plea (INS Br. 77) not "to deprive Chadha of the benefit of the judgment below [nor] . . . to force him to relitigate the date on which he acquired permanent resident status . . . [in a naturalization petition]" is misconceived.

[18] "Implicit in the foregoing is the philosophy that the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. This philosophy has no place in our constitutional scheme." *Valley Forge Christian College, supra* n. 15, at 4110.

[19] *See Buckley* v. *Valeo, supra* n. 12, at 285 (White, J., concurring and dissenting).

approach is inconsistent with sound principles of judicial restraint.

Rather, the limited constitutional question on which the court of appeals more properly focused is the consistency of the particular roles of the executive and legislative branches under section 244 with the separation of powers doctrine. The INS states that "this case involves a legislative veto of an order issued in an administrative *adjudication*. . ." (INS Br. 49 n. 32). Neither the executive's discretionary decision to suspend the deportation of an eligible alien, nor the ultimate congressional decision to grant dispensation from the requirements of mandatory deportation laws, may be readily classified in conventional separation of powers terms. As this Court recently stated, "[I]t is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed." *Dames & Moore* v. *Regan*, 101 S. Ct. 2972, 2977 (1981).[20]

The court of appeals recognized that section 244 authorizes the Attorney General, and by subdelegation the INS, to perform two distinct functions: the determination of eligibility for relief under specified standards and the exercise of discretion over relief among the eligible aliens. "The suspension proceeding 'has two phases: a determination whether the statutory conditions have been met, which generally involves a question of law, and a determination whether relief shall be granted, which [ultimately] . . . is confided to the sound discretion of the Attorney General [and his delegates].' 2 C. Gordon & H. Rosenfield, [Immigration Law & Procedure] § 7.9a(5)[,] at 7–134 [(rev. ed. 1981)]" (J.S. 39a). The dual nature of the task before the INS derives from the explicit language of subsection 244 (a), which states that "the Attorney General *may, in his discretion,* suspend deportation . . . in the case of an alien who" meets various statutory prerequisites (emphasis added). "Congress has not granted relief to all qualified applicants but has

[20] *See Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting) (administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories. . . . [They] have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with the confession that all recognized classifications have broken down. . .").

declared that relief may be awarded in the discretion of the Attorney General. The administrative officers must exercise their discretion in determining whether to award relief to qualified applicants, and in this aspect their power is most expansive." 2 C. Gordon & H. Rosenfield, *supra* p. 15, § 7.1b, at 7–11.

This Court has accordingly held, "[T]he statute does not contemplate that all aliens who meet the minimum legal standards will be granted suspension. Suspension of deportation is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though statutory prerequisites have been met." *United States ex rel. Hintopoulos* v. *Shaughnessy*, *supra* n.13, 353 U.S. at 77. "Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General." *Jay* v. *Boyd*, 351 U.S. 345, 353 (1956). *See* 2 C. Gordon & H. Rosenfield, *supra* p. 15, § 8.15c, at 8–130 to –131. The Solicitor General has made the identical point: "If an alien meets all three eligibility requirements, the Attorney General must then decide whether suspension relief is warranted in the exercise of his 'unfettered discretion.' " Petition for Certiorari at 10, *INS* v. *Wang*, 450 U.S. 139 (1981).

The INS's exercise of "unfettered discretion" cannot be categorized within the formal tripartite scheme of separated powers. It is certainly not adjudicatory because it does not involve the application of fixed standards to individual cases, as does the INS's threshold determination of eligibility. Likewise, the reserved authority of the Congress to determine whether to grant permanent residence is a discretionary power that does not fit easily into a theoretical model of separation of powers.

Rather, section 244 is a special arrangement to achieve broad agreement within the political branches when it would be "unconscionable" S. Rep. No. 1137, 82d Cong., 2d Sess. 25 (1952), to enforce mandatory deportation laws. By giving the initiatory power to the executive and requiring a final determination by the Congress within a fixed period of time it creates an effective system by which the elected branches may agree to grant dispensation. The sharing of discretionary authority to achieve equity is an effort to reconcile the desire

for humane government with principles of democratic accountability and does not merit charges of legislative tyranny.[21]

Section 244 satisfies both aspects of the separation of powers standard of *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). It is neither disruptive nor unnecessary. The limited arrangement to share authority to exercise unfettered discretion to grant relief from deportation does not interfere with historically traditional or inherently executive functions of the executive branch, such as initiating prosecutions.[22] Nor does section 244 interfere with the executive's responsibility to enforce the law. "When Congress enacts a statute that is complete in policy aspects and ready to be executed as law, Congress has recognized that enforcement is only an executive function. . . ." *FTC v. Ruberoid Co., supra* n. 20, 343 U.S. at 488 (Jackson, J., dissenting). Section 244 is not, however, "complete in policy aspects"; it provides no standards by which discretion should be exercised to grant permanent residence to eligible deportable aliens. Its limited function is

[21]Dean Landis commented at about the time Congress first invoked legislative review to resolve impasses concerning reorganization and relief from deportation, "[T]he devices, virtually, have all the benefits of delegation, [but] they do not run the risk of what the courts have called 'abnegation.'" J. Landis, The Administrative Process 79 (1938).

The Court has sustained other flexible arrangements to exercise governmental authority over the award of a valuable benefit. For example, it upheld authority conferred on the President by Congress under the Civil Aeronautics Act, ch. 601, § 801, 52 Stat. 973, 1014 (1938) (current version at 49 U.S.C. 1461 (1976)), to exercise "positive and detailed control over the [CAB's] decisions, unparalleled in the history of American administrative bodies," regarding overseas and foreign air transportation applications, while foreclosing judicial review. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109 (1948). The Court observed, "Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies." *Id.* at 110.

[22]The constitutional commitment of prosecutorial discretion to the executive branch is firmly established. *See United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *United States* v. *Alessio*, 528 F.2d 1079, 1081–82 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976). Congress has long recognized the inherently executive nature of the prosecutorial function. *See* L. White, The Federalists 454–55 (1948) (power of United States Attorneys regarding initiation of prosecutions viewed by Congress from 1790's as "highly discretionary").

to establish a procedure by which the executive and the Congress may agree in future cases that the application of mandatory deportation laws would be "unconscionable."

CONCLUSION

Myers v. United States, 272 U.S. 52 (1926), was the first of the only two cases in which this Court has struck down an act of Congress as an infringement on executive power. The Court reviewed the long history of litigation over the removal power, noting that it had "studiously avoided deciding the issue until it was presented in such a way that it could not be avoided. . . ." *Id.* at 176. Even then, the Court wrote so broadly that within a few years it found it necessary to narrow its holding as it responded to the diversity of arrangements which the representative branches had fashioned to govern the nation. *See Humphrey's Executor v. United States*, 295 U.S. 602, 626–27 (1935). In recounting this episode, Justice Frankfurter commented that "[t]he versatility of circumstances often mocks a natural desire for definitiveness." *Wiener v. United States*, 357 U.S. 349, 352 (1958).

Respondents continue to press their constitutional claims in a review of a deportation order that has become academic. The judgment of the court of appeals should be vacated, and the case should be remanded to the INS to determine the availability of statutory relief. Alternatively, the Court may resolve the case by a plain reading of the statute and of Congress's intent: section 244 is a unitary relief procedure, which may not be severed and refashioned as respondents propose. Finally, if the merits are reached, section 244 should be upheld on the narrow basis of this special arrangement adopted by the Congress and the President to share discretion to grant dispensation from mandatory deportation laws.

Respectfully submitted,

MICHAEL DAVIDSON,
Senate Legal Counsel,
M. ELIZABETH CULBRETH,
Deputy Senate Legal Counsel,
CHARLES TIEFER,
MORGAN J. FRANKEL,
Assistant Senate Legal Counsels.

FEBRUARY 1982.

U.S. GOVERNMENT PRINTING OFFICE : 1982 O - 89-768